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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,

Petitioners,

v.

TOWN OF FREMONT,

Respondent.

On Petition for Writ Of Certiorari To
The Supreme Court of New Hampshire

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Liability for a Fifth Amendment Taking:** When a state's highest court declares a growth control regulation "invalid *ab initio,*" but a town had enforced that illegal regulation in excess of its police powers against a specific piece of property, is the town liable to the affected property owner for a taking because it has failed to "substantially advance legitimate state interests"? (*Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)).

2. **Liability for a Fifth Amendment Taking:** Alternatively, when a state's highest court declares a growth control regulation "invalid *ab initio*" but a town had enforced that regulation against a specific piece of property, should that illegal municipal conduct be considered under the "character of government action" factor set forth in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978), as one element to determine whether the town is liable for a taking?

3. **Remedy for a Fifth Amendment Taking:** Does the "self-executing character" of the Takings Clause compel the payment of "just compensation" to an aggrieved property owner for the time period in which a growth control regulation, declared "invalid *ab initio*" by a state's highest court, was enforced against a specific piece of property? (*First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987)).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The Petitioners are Henry Torromeo, a sole proprietor, and MDR Corporation, a small, family-owned business incorporated in the State of New Hampshire and run by brothers Mark and Daniel Post, and their father, Russell Post. MDR Corporation has no parent or subsidiary corporation. The Petitioners are in the business of developing and building single-family home sites.

The Respondent is the Town of Fremont, a municipal corporation in the southeast corner of New Hampshire near the Massachusetts border.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

TABLE OF APPENDICES ix

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

A. Petitioners' Plans to Build 19 New Homes in Fremont, New Hampshire 3

B. The New Hampshire Courts Decide That the Growth Control Ordinance is "Invalid, *Ab Initio*," and That the Town Must Issue Building Permits to the Petitioners 5

C. Petitioners' Takings Lawsuits in State Court for Compensation 8

D. The New Hampshire Supreme Court's Decision 10

REASONS FOR GRANTING THE WRIT 11

I. THE NEW HAMPSHIRE SUPREME COURT HAS SUBVERTED AND IGNORED THIS COURT'S TEST FOR REGULATORY TAKINGS LIABILITY 11

A. When the Town Exceeded its Police Power, it Failed to "Substantially Advance" a Legitimate Public Interest and Became Liable for a Taking 12

B. Alternatively, the New Hampshire Supreme Court Should Have Considered the Town's Action in Enforcing an Illegal Regulation Under *Penn Central*'s Multi-Factor Test for Takings Liability 16

C. The New Hampshire Supreme Court Flatly Contradicted This Court's Cases When It Ruled That Takings Liability Can Be Found Only Where an Ordinance Is Itself Unconstitutional 20

II. THE NEW HAMPSHIRE SUPREME COURT HAS SUBVERTED AND IGNORED THIS COURT'S DECISIONS THAT JUST COMPENSATION IS THE SOLE CONSTITUTIONAL REMEDY FOR A TAKING 22

III. THE LOWER COURTS ARE IN CONFLICT REGARDING THE RELEVANCE OF INVALID AND ILLEGAL LAND-USE REGULATION IN THE TAKINGS CONTEXT 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 11, 16

Barnes v. Glen Theatre, Inc. 501 U.S. 560 (1991) 13

Brown v. Legal Found. of Washington, 538 U.S. ---, 2003 WL 1523550 (March 26, 2003) 17, 20-21, 23

Burrows v. Keene, 432 A.2d 15 (N.H. 1981) 2

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) 1

City of Cuyahoga Falls v. Buckeye Community Hope Found., 538 U.S. ---, 2003 WL 1477301 (March 25, 2003) 23

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999).....12

Cumberland Farms, Inc. v. Town of Groton, 719 A.2d 465 (Conn. 1998) 26

Dolan v. City of Tigard, 512 U.S. 374 (1994) 11, 15

Eberle v. Dane County Bd. Of Adjustment, 595 N.W.2d 730 (1999) 26

First English Evangelical Church v. County of Los Angeles 482 U.S. 304 (1987).....*passim*

TABLE OF AUTHORITIES
(continued)

Hawaii Housing Auth. v. Midkiff,
467 U.S. 229 (1984) 14

Hughes v. Washington, 389 U.S. 290 (1967) 21

J.E.D. Assocs., Inc v. Atkinson, 432 A.2d -12, (N.H. 1981)15

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987) 11, 20

Landgate, Inc. v. California Coastal Comm'n,
953 P.2d 1188 (Cal. 1998), *cert. denied,*
525 U.S. 876 (1998) 27

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 17

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 11, 18

Nollan v. California Coastal Comm'n
483 U.S. 825 (1987) 13, 14-15, 16

Palazzolo v. Rhode Island, 533 U.S. 606 (2001).....*passim*

Penn Central Transp. Co. v. City of New York,
483 U.S. 104 (1978).....*passim*

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) ..... .15, 28

Pheasant Bridge Corp. v. Township of Warren, 777 A.2d
334 (N.J. 2001), *cert. denied,* 535 U.S. 1077 (2002) 28

TABLE OF AUTHORITIES
(continued)

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 13, 21, 23, 25

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) ....*passim*

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002) 27

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 20

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal

U.S. Const. amend. V.....1, 20
U.S. Const. amend. XIV 1
28 U.S.C. §1254(1) 1

New Hampshire

N.H. Const. Art. XII, Part 1 2
RSA 39:2.....6
RSA 674:5.....6
RSA 674:22.....6
RSA 674:39.....5, 7

TABLE OF AUTHORITIES
(continued)

OTHER

BLACK'S LAW DICTIONARY 4 (7th ed. 1999) 6

John J. Delaney, *What Does it Take to Make a "Take"? A Post-Dolan Look at Evolution of Regulatory Takings Jurisprudence in the Supreme Court,* 27 Urb. Law. 55, 58 (1995) 11

Opinion of the Justices, 134 A.2d 281 (N.H. 1957) 6-7

www.newhampshire.com/pages/histmarkerseacoast.cfm 3

www.seacoastonline.com/living/fremont.htm.....3

TABLE OF APPENDICES

A. December 13, 2002 Opinion of New Hampshire Supreme Court, denying takings liability..... App. 1

B. September 26, 2001 Order of Rockingham Superior Court, awarding damages to Petitioners..... App. 7

C. March 19, 2001 Order of Rockingham Superior Court, on Motion of Reconsideration..... App. 18

D. January 17, 2001 Order of Rockingham Superior Court, on Request for Ruling of Law..... App. 23

E. October 3, 2000 Order of Rockingham Superior Court, on Motion for Summary Judgment ..... App. 26

F. June 26, 2000 Summary Affirmance of New Hampshire Supreme Court..... App. 27

G. December 27, 1999 Order of Rockingham Superior Court, declaring Growth Control Ordinance "Invalid Ab Initio" ..... App. 28

H. January 31, 2000 Order of Rockingham Superior Court, regarding Torromeo Industries' Vested Lots... App. 32

I. New Hampshire Constitution, First Part, Article 12 ..... App. 39

J. New Hampshire Statutes..... App. 40-App. 44
RSA 39:2, "Warrant" ..... App. 40
RSA 674:5, "Authorization" for Capital Improvement Program..... App. 41
RSA 674:22, "Growth Management; Timing of Development" ..... App. 42
RSA 674:39, "Four Year Exemption" for Vested Lots..... App. 43

TABLE OF APPENDICES
(continued)

K. Town of Fremont "Growth Management and Innovative Land Use Control" Ordinance..... App. 45

L. Notice of Decision of Town of Fremont Planning Board, "Growth Control and Permit Limitations," April 14, 1999 ..... App. 52

M. February 12, 2003 letter from U.S. Supreme Court, extending time to file Petition for Writ of Certiorari..... App. 55

PETITION FOR WRIT OF CERTIORI

Henry Torromeo and MDR Corporation ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of New Hampshire, dated December 13, 2002. Appendix ("App.") 1.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire is reported at 813 A.2d 389 (N.H. 2002). (App. 1-6.) Orders of the New Hampshire Superior Court awarding Petitioners monetary damages (App. 7–17), and finding liability on the part of the Town as a matter of law for its land-use decisions (App. 18–25), are not reported.

JURISDICTION

The judgment of the New Hampshire Supreme Court was entered on December 13, 2002. (App. 1.) On February 12, 2003, Justice Souter extended the time to petition for certiorari to and including April 14, 2003. (App. 55.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use without just compensation." It is applicable to the States through the Fourteenth Amendment,[1] which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

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[1] See *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001), citing *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226 (1897).

Article 12, Part 1 of the New Hampshire Constitution, the State's corollary to the Takings Clause, provides in pertinent part: "But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." (App. 39.) This provision has been interpreted to require the payment of compensation for a taking. *Burrows v. Keene,* 432 A.2d 15, 19 (N.H. 1981).

STATEMENT OF THE CASE

Three points need to be made at the outset. First, the key fact in this case is that the Town of Fremont, New Hampshire (the "Town"), has applied and enforced an *illegal* growth control ordinance—so declared by the State's highest court—to inhibit otherwise legal development of Petitioners' land.

Second, Petitioners do not dispute that the Town has a legitimate interest to control growth. However, Petitioners *do* contest the constitutionality of the Town's actions when it enforced an illegal law against them. Certiorari should be granted to clarify that a municipality can violate the Takings Clause when it enforces an illegal land-use law, which a court declares was invalid from the start, and refuses to provide the constitutional remedy of "just compensation" promised by the Fifth Amendment.

Third, the posture of this case is a challenge to government action applying a land-use regulation to specific parcels of land. This is not a facial challenge against the constitutionality of an ordinance. Last term, the Court stated that the specter of takings liability rises in as-applied cases such as this one. See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302, 334 (2002).

A. Petitioners' Plans to Build 19 New Homes in Fremont, New Hampshire.

Originally part of Exeter, New Hampshire until it was incorporated in 1764, the Town of Fremont (the "Town") was first named "Poplin" after a prosperous mill town in England.[2] In 1854, the Town was re-named in honor of John C. Fremont, the first presidential candidate of the Republican party, who lost to Democrat James Buchanan in the 1856 election. Today, Fremont is a bedroom community of suburban Boston, a quiet town of neighborhoods that contain large residential lots with homes built from the same hardwood trees sustained since colonial times.

This case concerns two residential subdivisions in the Town. Petitioner MDR Corporation owned a 14-lot subdivision known as "Glidden Hill Estates." Petitioner Henry Torromeo owned the last five lots in a 27-lot subdivision known as "Mason's Corner." Both Petitioners desired to build homes on their lots and then sell the improved parcels. The Fremont Planning Board had fully reviewed and approved both projects to accommodate single-family homes.[3]

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[2] See www.seacoastonline.com/living/fremont.htm (last visited Apr. 8, 2003). Famous for its heavy growth of high quality hardwoods, the English Crown had reserved the Town's best trees for ship masts, but the Townspeople spirited off the remainder of the hardwoods to construct their homes and barns. Alarmed by the timber harvests, the royal Governor dispatched a surveyor to inspect the local mill for illegally cut mast trees. In 1734, the Mast Tree Riot took place in the Town, where locals rebelled by cutting down the tall trees prior to the surveyor's arrival. The Townspeople then later returned disguised as Indians and ambushed ten of the surveyor's troops. See www.newhampshire.com/pages/histmarkerseacoast.cfm (last visited Apr. 8, 2003).

[3] Navigating the subdivision approval process in New Hampshire is no small task. In accordance with zoning and subdivision regulations, Petitioners were obligated to prepare perimeter surveys, evaluate the

In March of 1999, the Town "adopted" the subject Growth Control Ordinance (the "Ordinance"), which gave the Planning Board authority to limit the number of building permits for residential units. (App. 45-51.) On April 14, 1999, the Fremont Planning Board acted on this authority by imposing "Growth Control and Permit Limitations" to restrict the number of building permits that it would issue to property owners during the year April 14, 1999, through April 13, 2000. (App. 52-53.)[4]

After the Ordinance's effective date, the Planning Board approved the Glidden Hill project and MDR requested six building permits to construct single-family homes at the site. The Town applied the Ordinance to MDR's project, granted only five permits, and told MDR it would have to wait at least a year, until April 2000, at the earliest until additional permits for Glidden Hill could issue. After the Town issued only five permits, MDR applied for permits on the remaining nine lots to fully build-out the subdivision, which the Town also denied.

With regard to Mason's Corner, Torromeo personally owned the last five remaining house lots in the 27-lot subdivision. (He had previously built homes on and sold the other 22 lots.) This project was recorded with the county and eligible for building permits as of February 6, 1997—more than

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topography of the property, perform high intensity soil surveys, and develop fully engineered plans showing all roadways and utilities. Additionally, Petitioners were required to secure various state permits, including dredge and fill permits, site specific permits, and curb cut permits.

[4] The Planning Board's "Growth Control and Permit Limitations" determined that a maximum of twenty-six (26) permits for residential construction could be issued throughout the Town, in the year from April 14, 1999 through April 13, 2000. (App. 52, ¶2.). Once a permit was issued, a builder had only 30 days to begin construction or else the permit would lapse. (App. 53, ¶3B.)

two years before the Town adopted the Ordinance in March 1999. Because plats were recorded prior to the Ordinance, Mason's Corner qualified as a vested subdivision and was "exempt from all subsequent changes [in] zoning ordinances...for a period of four years...." See RSA 674:39. (App. 43.) Nonetheless, when Torromeo applied for building permits on the five remaining lots in September 1999, the Town ignored Mason Corner's vested status and refused to issue the permits because the maximum number of approvals allowed by the Ordinance had been granted by that time.

A builder with a building lot, but no building permits, is denied use of his property. In addition to complying with all subdivision requirements, both MDR and Torromeo had built and paved the roads necessary to accommodate their plans, in reliance on prior Town and state approvals. See *supra* n. 3. Consequently, for roads alone, MDR spent over $225,000 and Torromeo spent over $775,000 for their respective projects. With unimproved lots valued at $85,000 each, both MDR and Torromeo could not build, had nothing of value to sell, and were not in a financial position to start over in another community, because their capital was tied up in the Town of Fremont.

B. The New Hampshire Courts Decide That the Growth Control Ordinance is "Invalid, *Ab Initio*," and That the Town Must Issue Building Permits to the Petitioners.

Ordinarily, it would have been acceptable for the Town to deny Petitioners' building permits for a period of time. Except in this case there is a crucial distinction. The Town denied the permits based on an Ordinance that was ultimately deemed *illegal* by the New Hampshire courts, because it lacked the statutory requirements to support a valid growth control law.

After their respective building permits were denied, MDR and Torromeo each filed suits against the Town for injunctive relief to compel permit issuance. In the MDR suit, New Hampshire Superior Court Justice Walter Murphy granted the requested injunction in a decision dated December 27, 1999. (App. 28-31.) He decided that the permits should have been issued because the Ordinance was "invalid, *ab initio*"[5] for failure to meet requirements established by the New Hampshire legislature. (App. 30.) The Town appealed to the New Hampshire Supreme Court. On June 26, 2000, it summarily affirmed Justice Murphy's decision that the Ordinance was "invalid, *ab initio.*" (App. 27.)

In a nutshell, the lower courts found the Ordinance illegal because it was never supported by a validly enacted Capital Improvement Program ("CIP"), a statutory prerequisite in New Hampshire for any growth control ordinance. See RSA 674:22 (App. 42.) A CIP contemplates the orderly construction of infrastructure projects like roads and sewers to control the timing of growth and to accommodate the community's projected needs. Under New Hampshire law, the local legislative body (known as the "Town Meeting") may regulate growth by authorizing the Planning Board "to prepare and amend a recommended program of municipal capital improvement projects over a period of at least 6 years." See RSA 674:5 (App. 41). To fully realize local democratic processes and foster public input, New Hampshire law directs that the Planning Board must publish a "warrant article" that "distinctly state[s]" the "subject matter of all business to be acted upon at the Town Meeting...."[6] RSA 39:2. (App. 40.)

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[5] Or, "[f]rom the beginning." *Black's Law Dictionary* 4 (7th ed. 1999).

[6] "It has long been the law of [New Hampshire] that the purpose of [the warrant] requirement is to inform the inhabitants of the business upon which

Under New Hampshire law, therefore, the Town was required to publish a warrant article informing the public that the Planning Board would be preparing a CIP.

But the Town never published such a warrant providing notice of the preparation of a CIP. As a result, the Town's citizens were deprived of a full and fair opportunity to speak to the vital issue of how, when, and where their community should grow. Without a valid CIP, the New Hampshire courts decided that the Ordinance—which propped the Town's denial of Petitioners' building permits—was "invalid, *ab initio*" and never should have been enforced. (App. 27, 30.)[7] Accordingly, on June 26, 2000, the Town issued the nine remaining building permits to MDR so homes could be built at Glidden Hill.

With regard to Mason's Corner, while the Town denied the building permits by color of the illegal Ordinance, Torromeo never even had to contest the Ordinance's statutory validity. His case was simpler because his last five lots were "vested" under New Hampshire statute, RSA 674:39 (see App. 43), and by law were exempt from the permit limitations of the Ordinance. Thus, on January 31, 2000, Superior Court Justice Richard Galway determined that building permits should issue for Mason's Corner. (App. 32-38.) The Town did not appeal this decision. Ultimately, in February 2000, the Town issued

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they are called to act in the meeting, to bring before the town substantially and intelligently the subject with which it has to deal." *Opinion of the Justices,* 134 A.2d 281, 283 (N.H. 1957) (citations omitted).

[7] Superior Court Judge Murphy rejected the Town's position that, at the end of its March 11, 1987 Town Meeting, a motion was made to appoint a committee to study the development of a future CIP. The motion was made after the Town Meeting had already considered 43 other published warrant articles under other business. But not a single pre-published warrant notified the public that a CIP would be addressed. (App. 30.)

the five permits enabling Torromeo to build the last homes at Mason's Corner.

C. Petitioners' Takings Lawsuits in State Court for Compensation.

Neither Torromeo's nor MDR's odyssey in the New Hampshire courts was over yet. Although permits were eventually issued to them, they had received no economic damages for the losses they sustained while the Town applied the illegal Ordinance to their respective properties. To obtain the remedy of "just compensation" that the Fifth Amendment makes available, Torromeo and MDR each filed actions in Rockingham County Superior Court for a taking under the U.S. and (New Hampshire) Constitutions.

At the start of the takings phase of their suits, MDR and Torromeo filed motions for summary judgment on the issue of liability. On October 3, 2000, the trial court initially denied the motions in a one-sentence order. (App. 26.) The trial court apparently accepted the Town's argument that the Ordinance was "merely" defective procedurally and the law itself needed to be "unconstitutional" before a taking would arise.

MDR and Torromeo then filed a "Request for Ruling of Law,"[8] arguing that the Town's refusal to issue building permits in reliance on the "invalid, *ab initio*" Ordinance was in and of itself an unconstitutional taking. On January 17, 2001, Superior Court Justice Kenneth McHugh reversed himself. He now believed that an award of damages *was* appropriate and Petitioners did "not have to prove the Ordinance is unconstitutional" to recover monetary relief. (App. 24.)

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[8] This procedure is allowed by New Hampshire Superior Court Rule 141 (parties may request "interlocutory orders...relative to proceedings preparatory for a hearing on the merits").

The Town then filed a motion for reconsideration because the trial court's January 17, 2001, order was inconsistent with its previous ruling denying liability on summary judgment. On March 19, 2001, the Superior Court formally joined the Torromeo and MDR takings actions, and found in hindsight that it should have initially granted Petitioners' motions for summary judgment. (App. 21.) It ruled that Petitioners were "entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or not a 'taking' has occurred under existing case law." (App. 20-21.) Thus, although the Superior Court hesitated to expressly hinge its finding of liability on the constitutional theory of a taking, it nonetheless found that the Town owed Petitioners damages for the time period in which the invalid Ordinance was enforced to deny issuance of the building permits.

A trial on damages came next. On September 26, 2001, Superior Court Justice Gillian Abramson found and ruled that Torromeo was entitled to the carrying costs and fair market rental value for his five unbuildable vested lots from August 26, 1999, through February 2000.[9] (App. 11.) Thus, the court ordered the Town to compensate Torromeo in the amount of $23,800. (App. 15.) With regard to MDR, the court found damages were due for the nine lots at Glidden Hill from August 26, 1999, through June 2000.[10] (App. 11.) Compensation for MDR was thus ordered in the amount of $71,600. (App. 15.)

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[9] August 26, 1999 was the date that building permits were no longer available under the invalid Ordinance. February 2000 was the date that building permits were again issued for Mason's Corner. (App. 11-12.)

[10] August 26, 1999 was the date that building permits were no longer available under the invalid Ordinance. June 2000 was the date that building permits were again issued for Glidden Hill. (App. 11-12.)

D. The New Hampshire Supreme Court's Decision.

The Town appealed to the New Hampshire Supreme Court. It reversed. (App. 1-6.) It decided that the Town was *not* liable to either Torromeo or MDR for damages. The New Hampshire Supreme Court thought "the trial court erred in failing to distinguish between an ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment." (App. 4-5.) A summary of its ruling follows:

- **Just Compensation *Is* Due** only when a court "determin[es] that the ordinance is unconstitutional and constitutes a taking...." (App. 6.) In other words, the regulation *itself* must be deemed unconstitutional to support a finding of takings liability. ***(But this Court has uniformly rejected the notion that a taking occurs in the context of facial challenges against regulations. See infra at p. 20.)***

- **Just Compensation Is *Not* Due** from "an erroneous planning board decision based upon an otherwise valid regulation." (App. 5.) ***(But this Court has repeatedly held that takings liability arises precisely where enforcement of valid laws go "too far." See infra at pp. 20-21.)*** The New Hampshire Supreme Court thought this case presented a situation of "mere[ ]... municipal error." (App. 6.) ***(But this Court has never stated that enforcement of a judicially invalidated law can be dismissed as a "mere" error. See infra at p. 21.)*** Accordingly, "judicial reversal of the erroneous action is the only remedy." (App. 6.) ***(But this Court has made clear that just compensation is the only remedy to redress a taking, and it must be paid to cover losses***

during the time that an invalid regulation is applied to particular property owners. See infra at pp. 22-25.)

This Petition followed.

REASONS FOR GRANTING THE WRIT

I. THE NEW HAMPSHIRE SUPREME COURT HAS SUBVERTED AND IGNORED THIS COURT'S TEST FOR REGULATORY TAKINGS LIABILITY.

Liability for a regulatory taking arises under two distinct modes of analysis: where the regulation (1) fails to "substantially advance legitimate state interests" or (2) "denies an owner economically viable use of his land." *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). See also *Dolan v. City of Tigard,* 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 485 (1987). The *Agins* test is disjunctive. Government is liable for a taking where regulation *either* fails to substantially advance a legitimate state interest *or* deprives the owner of economically viable land use. See, e.g., John J. Delaney, *What Does it Take to Make a "Take"? A Post-Dolan Look at Evolution of Regulatory Takings Jurisprudence in the Supreme Court,* 27 Urb. Law. 55, 58 (1995).

Certiorari should be granted because the New Hampshire Supreme Court misapplied both prongs of the *Agins* test. When the Town enforced the invalid Ordinance it exceeded the scope of its police power, and thus did not "substantially advance" any legitimate government interest (failing *Agins* Prong 1). Alternatively, enforcement of the invalid Ordinance must at least be one factor that the court below should have considered to decide if Petitioners were deprived of economically viable use of their land (under *Agins* Prong 2). Either way, this

Court's tests for takings liability have been subverted and ignored.

A. When the Town Exceeded its Police Power, it Failed to "Substantially Advance" a Legitimate Public Interest and Became Liable for a Taking.

The Court has recognized that its cases to date have only directly addressed the "substantial advancement" prong in the "context of required dedications or exactions" attached as conditions to permit *approvals.* See *City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 704 (1999). Last term, the Court invited the opportunity to consider the "substantial advancement" prong in a case like this, concerning permit *denials.* In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002), the Court declined to hold that moratoria stopping development for 32 months amounted to a *per se* taking in a facial challenge against the regulations. However, Justice Stevens' majority opinion stressed that "[c]onsiderations of 'fairness and justice' " could have supported a finding that the "moratoria were takings based on any of seven different theories." *Id.* at 333. The "[s]ixth" of these theories was that "petitioners might have argued that the moratoria did not substantially advance a legitimate state interest, see *Agins* and *Monterey.*"[11] *Id.* at 334. The sixth theory from *Tahoe-Sierra* is the precise situation presented here.[12] This Petition allows the Court to assess the "substantial

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[11] In *Monterey*, the Court found that whether a city's decision to deny a development plan "substantially advances legitimate public interests within the meaning of our regulatory takings doctrine...is probably best understood as a mixed question of fact and law," and was thus an appropriate jury question. 526 U.S. at 721.

[12] An independent basis upon which to grant this Petition is to clarify the "seventh" theory identified in *Tahoe-Sierra*, namely, whether application of a regulation restricting growth is a taking under the ad hoc balancing test of

advancement" test when a regulatory body denies development permits through invalid exercise of its police powers. [13]

Under *Agins* prong 1, this Court's "cases describe the condition for abridgment of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest." *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 841 (1987) (emphasis in original). The Court is "inclined to be particularly careful about the ['substantial'] adjective" when there is a "heightened risk" that the land-use restriction fails to further "the stated police-power objective." *Id.* In Justice Brennan's plurality dissent from *San Diego Gas & Electric Company,* he also drew the connection between a sovereign's police power and the Takings Clause. He declared that the California courts "flatly contradict[ed] clear precedents of this Court" when they held that "a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of law constitute a 'taking' within the meaning of the Fifth Amendment." *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 647 (1981) (Brennan, J., dissenting). And Justice O'Connor has explained that "[t]he first question" in a takings analysis is whether "application of a regulation constitutes a valid exercise of the police power." *Palazzolo v. Rhode Island,* 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

Here, the governmental action at issue fails even this first question. When the Town enforced the illegal Ordinance it exceeded the scope of its police powers. Thus, the Town's conduct was not "coterminous" with the Takings Clause and it

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Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). See *Tahoe-Sierra,* 534 U.S. at 334. *Infra* at pp. 16-20.

[13] "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals [of the people] ...." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 569 (1991).

became liable to pay just compensation when it blocked development on Petitioners' land. See *Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 240 (1984) ("the 'public use' requirement is ... coterminous with the scope of a sovereign's police powers").

Admittedly, the Town has a legitimate interest to administer the pace of growth within its borders. But that interest was not advanced, "substantially" or otherwise, when the Town applied the *illegal* Ordinance to deny Petitioners' building permits. How could the Town further its land-use planning goals by engaging in illegal conduct? Indeed, after the New Hampshire Supreme Court affirmed that the Ordinance was "invalid, *ab initio,"* Petitioners obtained their permits and building proceeded. For a fact, none of the "Purposes" or "Findings" that propped-up the Ordinance (App. 45-46) were advanced in this case *at all.*

Nollan is a leading case that explores the "substantial advancement" prong. There, the landowners wanted to expand a beachfront bungalow. The California Coastal Commission approved expansion on the condition that the owners grant a permanent easement providing the public with lateral access across their beachfront lot. The Court decided that the California regulators were liable for a taking because there was no "essential nexus" between the demanded easement condition for lateral access, and the government's stated justification to provide the public with visual access to see the beach from the highway behind the Nollans' home. *Nollan,* 483 U.S. at 837. As the Court wrote:

> Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban,

> the building restriction is not a valid regulation of land-use but "an out and out plan of extortion."

Id. at 837 (citing *J.E.D. Assocs., Inc. v. Atkinson,* 432 A.2d 12, 14-15 (N.H. 1981).

Under *Nollan*, the Town of Fremont's improper refusal to issue building permits in reliance on the illegal Ordinance "utterly fail[ed] to further the end advanced as the justification for the prohibition." *Nollan,* 483 U.S. at 837. The Town's otherwise valid purpose was "completely set adrift from its constitutional moorings" when it purported to achieve its growth planning objectives under the guise of an illegal law. See *Dolan v. City of Tigard,* 512 U.S. 374, 387 (1994). Plainly, the Takings Clause does not permit government to "leverag[e]...the police power" in this manner. *Nollan,* 483 U.S. at 837 n.5.

The consequences of rejecting takings liability where government surpasses the already-broad latitude of its police power would be unfortunate. If the decision below stands, government can knowingly or negligently avoid takings liability by enacting growth control laws that exceed legislative authority, derogate public notice requirements, or disregard mandated statutory procedures. Gaming the municipal system in this regard must be discouraged. It "would create a perverse system of incentives" to find that government could be liable for a taking when it enforces valid laws, but is immune from takings liability in the face of regulatory subterfuge that enacts growth control laws which purposefully defy legal requirements. See *Tahoe-Sierra,* 535 U.S. at 340. Or, if a taking can arise when application of a *valid* land use regulation "goes too far," see *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), then application of a land-use regulation that

was *never valid* goes *even further* beyond constitutional parameters.

"The State may not... secure a windfall for itself" by avoiding the Fifth Amendment's just compensation remedy when it acts outside the scope of its police powers. *Palazzolo,* 533 U.S. at 627. Accordingly, the Court's review is warranted to address the Town's liability under the *Agins* "substantial advancement" prong.

B. Alternatively, the New Hampshire Supreme Court Should Have Considered the Town's Action in Enforcing an Illegal Regulation Under *Penn Central*'s Multi-Factor Test for Takings Liability.

Certiorari should also be granted to address the Town's takings liability under prong 2 of the *Agins* test, where regulation "denies an owner of economically viable use of his land." *Agins,* 447 U.S. at 260. In this regard, the New Hampshire Supreme Court's decision conflicts with *Tahoe-Sierra, Palazzolo,* and *Penn Central.*

A motif connects the "more recent vintage" of this Court's regulatory takings jurisprudence; it is "characterized by 'essentially ad hoc, factual inquiries,' *Penn Central,* 438 U.S. at 124, ... designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo,* 533 U.S. at 636 (O'Connor, J., concurring)." *Tahoe-Sierra,* 535 U.S. at 322. Justice O'Connor stated the Court's favored position in her *Palazzolo* concurrence:

> We have eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons"....The outcome "depends largely 'upon the particular circumstances [in that] case.' "
>
> * * *
>
> Our polestar ... remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.

Palazzolo, 533 U.S. at 633 (O'Connor, J., concurring) (citing, *inter alia, Penn Central,* 438 U.S. at 124).[14] Just last month the Court confirmed *Penn Central*'s prominence in *Brown v. Legal Found. of Washington,* 538 U.S. ---, 2003 WL 1523550 (March 26, 2003).

Penn Central established three factors to determine regulatory takings liability where, as here, the government denies land-use permits and thereby deprives the owner economically viable use of property. These factors are: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central,* 438 U.S. at 124.[15] These factors make clear that

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[14] Justice O'Connor's concurrence was cited with favor by *Palazzolo* dissenting Justices Ginsburg, Souter, and Breyer (533 U.S. at 654 n.3), and by Justice Stevens' majority opinion in *Tahoe-Sierra,* 535 U.S. at 327 n. 23.

[15] The Court has identified only two circumstances where *Penn Central* balancing is not appropriate and a *per se*, categorical taking arises: where government commits a physical invasion of property (see *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)), and where land-use regulation totally deprives any economically viable use of the

"*[t]he purposes served,* as well as the effects produced, by a particular regulation inform the takings analysis." *Palazzolo,* 533 U.S. at 634 (O'Connor, J., concurring (emphasis supplied)).

This case emphasizes the third factor, the "character of the governmental action." Petitioners submit that action taken by the Town outside of its police powers, when it applied the illegal Ordinance to deny the building permits, is at least a fact that the New Hampshire Supreme Court should have considered under a *Penn Central* analysis. But the New Hampshire Supreme Court declared that enforcing an illegal law is "merely" a "municipal error" that is *never* relevant to determine takings liability, and that only laws held to be "unconstitutional" can involve a takings analysis. (App. 6.)

This analysis by the New Hampshire Supreme Court cannot be squared with *Palazzolo*. There, the property owner asserted that the state committed a taking when it applied wetlands regulations to restrict development. The Rhode Island Supreme Court rejected the takings claim, stating that the property owner lacked "reasonable investment-backed expectations" because he acquired title *after* the regulations were enacted. This Court, however, held that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." *Palazzolo,* 533 U.S. at 627. It rejected the state's "sweeping rule" (*id.* at 626), that a takings claim is barred by "the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 630. The Court thus remanded back to the Rhode Island Supreme Court with instructions to conduct a *Penn Central* analysis to determine if the State committed a taking. *Id.* at 632. Justice O'Connor concurred, stating that "interference with investment-backed expectations is one of a number of

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property (see *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)).

factors that a court must examine." *Id.* at 633 (O'Connor, J., concurring). She stressed that "it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance." *Id.*

So too, here. It was error for the New Hampshire Supreme Court to "expunge" the character of the Town's action from the takings analysis. It should have considered the Town's enforcement of the illegal Ordinance as one element under the *Penn Central* inquiry.

In *Tahoe-Sierra,* this Court also rejected a *per se* argument that a moratoria stopping all development for a temporary period of time (there, 32 months) must always result in a taking. The Court explained its view that "the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case." *Tahoe-Sierra,* 535 U.S. at 321. Because the "temporary nature of a land-use restriction...should not be given exclusive significance one way or the other," (*id.* at 337), the Court refused to find takings liability in a facial challenge to the ordinances. This result cannot be reconciled with the New Hampshire Supreme Court's ruling, which requires that an ordinance itself must be "unconstitutional and constitute[s] a taking." (App. 6.) This Court also made clear that the property owners in *Tahoe-Sierra* "might have prevailed under a *Penn Central* analysis" if they "had challenged the application of the moratoria to their individual parcels" (*id.* at 334)—the exact analysis that the New Hampshire Supreme Court failed to conduct. The decision below contradicts *Tahoe-Sierra* from every angle.

Palazzolo and *Tahoe-Sierra* reject "[t]he temptation to adopt what amount to *per se* rules in either direction ...." *Palazzolo,* 533 U.S. at 636. Because the New Hampshire Supreme Court

could not resist that temptation, certiorari should be granted so this Court can ensure that the enforcement of an illegal regulation is a fact that is appropriately weighed in the takings analysis.

C. The New Hampshire Supreme Court Flatly Contradicted This Court's Cases When it Ruled That Takings Liability can be Found Only Where an Ordinance is Itself Unconstitutional.

The New Hampshire Supreme Court believed that the Town could not be liable to pay just compensation "[a]bsent a determination that the ordinance is unconstitutional and constitutes a taking...." (App. 6.) It was wrong. This Court has never hinged takings liability on the unconstitutionality of a regulation *itself.* In *Tahoe-Sierra,* the Court rejected a facial challenge to the moratoria at issue and recognized that the property owners faced a steep "uphill battle" in arguing that "the mere enactment" of a law is *per se* unconstitutional. *Tahoe Sierra,* 535 U.S. at 320 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 495 (1987)). See also *United States v. Riverside Bayview Homes,* 474 U.S. 121, 126 (1985) ("the mere assertion of regulatory jurisdiction" under the Clean Water Act Section 404 permit program "does not constitute a regulatory taking").

The New Hampshire Supreme Court also turned the Fifth Amendment on its head when it stated that takings liability could not arise from a land-use decision based on "an otherwise valid regulation." (App. 5.) But the text of the Fifth Amendment itself expressly contemplates takings for a valid "public use." U.S. Const. Amend. V. Last month, Justice Stevens wrote for a unanimous Court that one of the "conditions" imposed by the Fifth Amendment is that a taking must be for "public use." *Brown v. Legal Found. of*

Washington, 538 U.S. ---, 2003 WL 1523550 (March 26, 2003).[16] Accordingly, takings liability indeed arises where the government enforces a valid law to achieve a legitimate public purpose.[17] The Constitution is infringed when such a valid law goes "too far" in its application and the property owners, as here, are not compensated.

In *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 322 (1987), the Court stated that a taking must be distinguished from "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.* at 322. Of course, "normal" delays typically arise in the course of the land-use approval process, where *valid* laws are *legally* enforced. It abuses this Court's regulatory jurisprudence to find that application of a judicially invalidated law is a "normal" delay.

In the end, "[f]rom the property owner's point of view, it may matter little whether his land" is rendered unusable by an unconstitutional law or one that is merely illegal on some other ground. See *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 652 (Brennan, J., dissenting). "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.*" *Hughes v. Washington,* 389 U.S. 290, 298 (1967) (Stewart, J., concurring) When the Town applied the illegal Ordinance, this was not a mere "error" to be sloughed-off.

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[16] The second "condition" is that "just compensation must be paid to the landowner." *Brown v. Legal Found. of Washington,* 538 U.S. ---, 2003 WL 1523550 (2003). See *infra* at pp. 22-23.

[17] See, e.g., *Tahoe-Sierra,* 535 U.S. at 333-34 (valid laws enforced to protect Lake Tahoe could lead to a taking); *Palazzolo,* 533 U.S. at 632 (enforcement of valid wetlands protection law could render state liable for a taking); *Lucas,* 505 U.S. at 1003 (state liable for a taking in enforcing valid beachfront management law).

* * *

To conclude, certiorari should be granted because this Court's line of takings cases were rejected when the court below:

- Failed to consider *Agins* Prong 1, insofar as the Town's application of an illegal law failed to substantially advance a legitimate state interest;
- Failed to balance the Town's illegal conduct as a relevant factor under the *Penn Central* test; and
- Failed to follow this Court's holdings that a law itself does not need to be "unconstitutional" to support a finding of liability under the Takings Clause.

II. THE NEW HAMPSHIRE SUPREME COURT HAS SUBVERTED AND IGNORED THIS COURT'S DECISIONS THAT JUST COMPENSATION IS THE SOLE CONSTITUTIONAL REMEDY FOR A TAKING.

As explained in Part I, certiorari should be granted so the Court can address the "logically prior question whether [application of] the temporary regulation at issue had in fact constituted a taking." *Tahoe-Sierra,* 535 U.S. at 328. After addressing the antecedent question of the Town's takings liability, certiorari should be granted so this Court can correct the New Hampshire Supreme Court's erroneous ruling on the *remedy* for a taking.

Of all the fundamental protections set forth in the Bill of Rights, the Takings Clause is unique. When it is infringed, it is the only clause that requires the payment of a monetary remedy – "just compensation" – to an aggrieved citizen. "Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.'" *First English,* 482 U.S. at

314. Thus, an award of compensation is triggered not because (or until) a regulation is declared unconstitutional, but rather because of the "self-executing character of the constitutional provision with respect to compensation." *Id.* at 316 (citations omitted). Where the government's activities have already worked a taking, "no subsequent action by the government can relieve it of the duty to provide compensation for the period of time during which the taking was effective." *Id.* at 321. Justice Brennan believed the mandate for compensation was evident:

> The Constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first affected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 636 (1981) (Brennan, J. dissenting), endorsed in *First English,* 482 U.S. at 315, 318, 321. The vitality of this rule could not be stronger. Last month, the Justices twice re-confirmed that just compensation is the sole remedy for a taking. *Brown v. Legal Found. of Washington,* 538 U.S. ---, 2003 WL 1523550 (March 26, 2003); *City of Cuyahoga Falls v. Buckeye Community Hope Found.,* 2003 WL 1477301 (March 25, 2003) (Scalia, J., concurring).

The New Hampshire Supreme Court defied these pronouncements when it decided that delayed issuance of "erroneously-denied" building permits was Petitioner's only remedy. (App. 6.) Judicial reversal of the erroneous regulatory action is *not* the remedy countenanced by the Fifth Amendment; the *sole* available constitutional remedy is the award of just compensation. The court below was also wrong in thinking that

compensation is triggered only in cases where "an ordinance is unconstitutional." (App. 6.) *First English* dispensed with this contention: "[I]t would require a considerable extension of [the Court's decisions] to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid." 482 U.S. at 320.

In short, no additional finding of the Ordinance's "unconstitutionality" was necessary, or warranted, to justify the payment of compensation. Particularly instructive is this Court's admonition in *First English*:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land use regulations. But such consequences necessarily flow from any decision upholding a claim of a constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. (482 U.S. at 321.)

It warrants further emphasis that the Town's actions here were not a "mere[ ]...type of municipal error." (App. 6.) Fremont's growth control Ordinance was *never* legal. If the payment of just compensation is triggered for even "proper" interference amounting to a taking, government should not be allowed to avoid the compensatory remedy where its interference is "invalid, *ab initio.*"

Finally, it does not matter if the taking is "temporary" or "permanent,"[18] the Fifth Amendment compels one remedy: just compensation.[19] "[T]emporary takings ... are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 318 (citations omitted). Here, because the New Hampshire courts invalidated the growth control Ordinance, Petitioners have sustained a temporary taking. Thus, *First English* directs that Petitioners must be compensated for the time during which the invalid regulation was in effect.

In the end, certiorari should be granted because the New Hampshire Supreme Court ignored the text of the Takings Clause itself and disregarded the constitutional rule of *First English*.

III. THE LOWER COURTS ARE IN CONFLICT REGARDING THE RELEVANCE OF INVALID AND ILLEGAL LAND-USE REGULATION IN THE TAKINGS CONTEXT.

As if clear disregard for this Court's takings jurisprudence were not enough, certiorari should be granted because the lower

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[18] The Court has stated that a "temporary" taking arises in the situation where the offending regulation is invalidated or otherwise removed. See *First English*, 482 U.S. at 310 ("'temporary' regulatory takings [are] those regulatory takings which are ultimately invalidated by the courts"). Implicit in this statement is that a permanent taking results where an otherwise valid ordinance remains in place but "goes too far." The practical difference between a temporary and permanent taking only pertains to the "the proper measure of the monetary relief" owed to the property owners." *Id.*, 482 U.S. at 318 (citations omitted). But whether the taking is temporary or permanent, some amount of compensation would always be due.

[19] See *San Diego Gas*, 450 U.S. at 657 (Brennan, J., dissenting) (takings need not be "permanent and irrevocable").

courts are in a state of confusion. Their opinions clash regarding whether illegal government land-use decisions should be factored in the equation to determine takings liability and remedy. This Court's review is needed to resolve the conflict.

Takings Liability Where Invalid Regulation is in Effect: The highest courts in Connecticut, Wisconsin, and the U.S. Court of Appeals for the Ninth Circuit, have all decided that just compensation is the appropriate remedy for the time period during which property is subject to invalid regulation:

- In *Cumberland Farms, Inc. v. Town of Groton,* 719 A.2d 465 (Conn. 1998), the town improperly denied a variance. Notwithstanding that the property owners retained some use of the service station on their property, the Connecticut Supreme Court held that they could pursue compensation for a temporary taking during the time that it took to litigate the invalidity of the town's denial. The court expressly noted that the town's argument was "contrary to the holding of *First English*...." 719 A.2d at 474.

- In *Eberle v. Dane County Bd. of Adjustment,* 595 N.W.2d 730 (Wis. 1999), the county denied an access permit. The Wisconsin Supreme Court held that the owners could pursue compensation for a temporary taking, notwithstanding that they regained full use of their property when that court eventually overturned the permit denial. The court expressly concluded that the county's argument against compensation was contrary to *First English.* 595 N.W.2d at 738.[20]

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[20] The *Eberle* dissent urged adoption of the position taken by the California Supreme Court in *Landgate,* discussed *infra* at p. 27. 595 N.W.2d at 748.

- Before this Court granted certiorari in *Tahoe-Sierra,* the Ninth Circuit stated that takings liability arises only where a court invalidates a regulation—the exact situation here. Relying on *First English,* the Ninth Circuit stated that "a *permanent* regulation leads to a *'temporary'* taking when a court invalidates the ordinance after the taking." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 216 F.3d 764, 778 (9th Cir. 2000), *aff'd,* 535 U.S. 302 (2002).

No Takings Liability Where Invalid Regulation is in Effect: In stark contrast, the highest courts in New Jersey and California have taken a position closer to the New Hampshire Supreme Court. They state that enforcement of an illegal regulation does *not* render the government liable for a taking:

- In *Landgate, Inc. v. California Coastal Comm'n,* 953 P.2d 1188, 1195 (Cal. 1998), *cert. denied,* 525 U.S. 876 (1998), the California Supreme Court stated that litigation to overturn a "legally erroneous decision of a government agency" is merely part of the normal "approval process" and that such a "regulatory mistake" cannot be compensated as a taking. *Id.* at 1195. The *Landgate* court also elevated *Lucas*'s "total taking" rule and rendered *Penn Central*'s partial taking analysis irrelevant where the government makes illegal land use decisions: Only "[i]f the error is of a particular type—the passage and enforcement of a law or regulation that deprives property of *all value*—then the teaching of *First English* is that such an error is a compensable taking." *Id.* at 1197 (emphasis added).[21]

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[21] Separate dissenting opinions believed that the majority's decision in *Landgate* directly contradicted *First English. Id.,* 953 P.2d at 1205-1212 (dissenting opinions of California Justices Chin, Baxter and Brown).

- In *Pheasant Bridge Corp. v. Township of Warren,* 777 A.2d 334 (N.J. 2001), *cert. denied,* 535 U.S. 1077 (2002), the New Jersey Supreme Court declared that, although the town arbitrarily and unreasonably applied a land use regulation, the landowner did not have a cognizable takings claim during the period in which it successfully challenged the ordinance. Compensation is not due in a situation "with an invalid ordinance in which government went beyond the scope of its zoning power, rather than a valid ordinance that effected a taking." *Id.* at 344.

If not rectified, the split in legal authority will beget more opinions as far removed and disparate as those discussed above. The issue is joined and the conflict is resolute. This Court's guidance is needed.

CONCLUSION

Decisions like the one below will embolden local governments to act carelessly, or even knowingly, in implementing ordinances that are illegal but nonetheless achieve the fashionable goal to halt development. As Justice Holmes recognized: "If...the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared'" (citations omitted). *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Justice Holmes's prescient warning is as compelling today as it was in 1922, when zoning laws barely existed and government regulation of land-use was a foreign concept. But in today's regulatory climate, if the New Hampshire Supreme Court's decision stands, a pattern of municipal abuse is easy to envisage: avoid the Fifth Amendment's restrictions by enforcing invalid laws.

Petitioners respectfully ask this Court to remind the Town of Fremont, and other municipalities tempted to overreach their powers, that their illegal actions have consequences under the Fifth Amendment. They must pay for what they take. "After all, a policeman must know the Constitution, then why not a planner?" *San Diego Gas,* 450 U.S. at 661 n. 26 (Brennan, J., dissenting.)

For all of the foregoing reasons, the Petition should be granted.

DATED: April 14, 2003

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APPENDIX A

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2001-612

HENRY TORROMEO

v.

TOWN OF FREMONT

MDR CORPORATION

v.

TOWN OF FREMONT

Argued: July 11, 2002
Opinion Issued: December 13, 2002

Sumner F. Kalman, Attorney at Law, P.C., of Plaistow (Sumner F. Kalman on the brief and orally), for the plaintiffs.

Casassa and Ryan, of Hampton (John J. Ryan on the brief and orally), for the defendant.

Susan Slack, of Concord, by brief, for the New Hampshire Municipal Association, as amicus curiae.

NADEAU, J. The defendant, the Town of Fremont (town), appeals orders of the Superior Court (McHugh and Abramson, JJ.), holding the town liable to the plaintiffs, Henry Torromeo and MDR Corporation (MDR), for damages caused by the town's

denial of building permits pursuant to an invalid growth control ordinance. We reverse.

The trial court found, or the record discloses, the following facts. Torromeo is the developer of Mason's Corner, a twenty-seven lot residential subdivision in Fremont. The subdivision plan was approved by the town planning board and recorded in the Rockingham County Registry of Deeds in February 1997. In August 1999,when five lots in the subdivision remained unsold, the town stopped issuing building permits pursuant to its growth control ordinance. Torromeo and a prospective purchaser sued the town, seeking to require it to issue a building permit to the buyer. The Trial Court (Galway, J.) determined that the subdivision was exempt from the growth control ordinance under RSA 674:39, which provides, in part, that an approved and properly-recorded plat or site plan is exempt from subsequent zoning ordinance changes, except those expressly protecting public health standards, for four years from the date of recording. See RSA 674:39 (1996). The court enjoined the town from refusing to issue the requested permit.

MDR is the developer of Glidden Hill Estates, a fourteen lot subdivision in Fremont. MDR was issued five building permits, but was informed by the town that under the growth control ordinance, no more permits would be issued until April 2000. MDR sued the town, challenging the growth control ordinance. MDR argued that the ordinance was invalid because the town never legally adopted a capital improvement program (CIP), which is a prerequisite to the adoption of a growth control ordinance, see RSA 674:22 (1996). The Trial Court (Murphy, J.) agreed, ruling, among other things, that because the subject of the motion made at the 1987 town meeting regarding a CIP was not stated in the warrant, the motion was invalid. The court therefore ruled that a valid CIP was never adopted and that the growth control ordinance was invalid ab

initio. We summarily affirmed that decision on June 26, 2000. See MDR Corporation v. Town of Fremont, No. 2000-100 (N.H. June 26, 2000).

Following the dispositions of their respective cases in superior court, the plaintiffs filed separate actions against the town for damages caused by the temporary taking of their property from the time building permits were denied under the growth control ordinance until they were finally issued. Each plaintiff filed a motion for summary judgment on the issue of liability, arguing, among other things, that the town's liability was established by the prior decision in the MDR case that the growth control ordinance was invalid ab initio. The town objected, arguing that the plaintiffs had to show that the ordinance was unconstitutional, not merely invalid or unenforceable. The Trial Court (McHugh, J.) denied the motions.

MDR then filed a request for a ruling of law that the decision declaring the ordinance invalid ab initio also rendered it "unconstitutional per se," making it unnecessary to further prove that the ordinance was arbitrary or unreasonable. The trial court ruled:

> As this Court understands the dispute, the determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages, but those damages would be limited to economic losses due to its inability to build homes for the period of time that the Town refused to grant building permits.

The court ruled that MDR would have to prove unconstitutionality, however, in order to recover attorney's fees.

The town filed a motion for reconsideration, which the court addressed in an order dated March 19, 2001. In that order, the court joined the MDR and Torromeo cases by consent of the parties. It then sought to clarify its prior rulings on the takings issue, noting in hindsight that it should have granted the plaintiffs' motions for summary judgment on the issue of liability. It concluded:

> Call it what you will, this Court finds and rules that the plaintiff [sic] in both of these cases are entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or not a "taking" occurred under existing case law.

A trial was held on the issue of damages and the Trial Court (Abramson, J.) awarded the plaintiffs the carrying costs and fair rental value on their unsold lots during the time the growth control ordinance prevented them from obtaining building permits. The town now appeals, contending that the trial court erred in ruling: (1) that the plaintiffs did not have to prove the unconstitutionality of the growth control ordinance in order to recover for a taking; and (2) that the plaintiffs could recover damages for loss of economic use of their property based solely upon the finding in the previous MDR case that the ordinance was invalid due to a procedural error.

"We will uphold the decision of the trial court unless it is unsupported by the evidence or is legally erroneous." Smith v. Town of Wolfeboro, 136 N.H. 337, 342 (1992). The town argues that the trial court erred in failing to distinguish between an ordinance that is unconstitutional and one that is merely

unenforceable due to a procedural defect in its enactment. We agree.

The ruling in the first MDR case, which the plaintiffs claim establishes liability for damages, did not find the growth control ordinance unconstitutional, but rather void due to a procedural defect. The trial court stated as much in its order on MDR's request for ruling of law: "Declaring that the Ordinance cannot be applied to the plaintiff because it was not procedurally enacted correctly does not mean the Ordinance is substantively unconstitutional." In ruling that the plaintiffs could nevertheless recover damages, however, the trial court erred.

We have held that "arbitrary or unreasonable [zoning ordinance] restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking, within the meaning of our New Hampshire Constitution requiring the payment of just compensation." Burrows v. City of Keene, 121 N.H. 590, 598 (1981) (quotation omitted). We have, however, rejected claims for damages in zoning ordinance challenges in which it was determined that no taking or inverse condemnation occurred, *see* Soares v. Town of Atkinson, 129 N.H. 313, 317 (1987), or where the constitutionality of the regulation was not challenged, *see* Smith, 136 N.H. at 345. We have also distinguished an erroneous planning board decision based upon an otherwise valid regulation from "the application of an invalid regulation," and held that the former does not constitute a compensable taking even though it may subject the property owner to a loss of value. Id. at 346; see also Dumont v. Town of Wolfeboro, 137 N.H. 1, 10 (1993). Rather, the owner's only remedy is reversal of the erroneous decision on appeal. See Smith, 136 N.H. at 346; Dumont, 137 N.H. at 10.

The plaintiffs argue that because the growth control ordinance was found to be invalid ab initio, this is a case of "the application of an invalid regulation" as discussed in Smith. We disagree. The context in which that term is used in Smith indicates that by "invalid regulation," we meant an unconstitutional one:

> . An erroneous planning board decision based on sound authority must be distinguished from the application of an invalid regulation. An appeal of a mistaken board decision is an element of the governmental decision making process under RSA 677:15 (amended 1991). A declaration that an ordinance is unconstitutional is an extraordinary measure, designed to rectify a conclusory act of rule making that stripped a property owner of his or her rights.

Smith, 136 N.H. at 346.

Absent a determination that the ordinance is unconstitutional and constitutes a taking, this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy. "Judicial, quasi-judicial, legislative or quasi-legislative acts of a town ordinarily do not subject it to claims for damages." Marino v. Goss, 120 N.H. 511, 514 (1980). Accordingly, we hold that the plaintiffs are not entitled to damages, and that their only remedy is issuance of the erroneously-denied building permits.

Reversed.

BROCK, C.J., and DALIANIS and DUGGAN, JJ., concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Henry Torromeo
v.
Town of Fremont

00-C-0256

MDR Corporation

v.
Town of Fremont

00-C-0257

ORDER

In these consolidated cases, plaintiffs seek monetary damages for lost development and real estate profit suffered after the Town of Fremont imposed and maintained an invalid interim growth control ordinance in March 1999.

In December 2000, the Court (Murphy, J.) ruled that the Town's original growth control ordinance was invalid ab initio for failing to comply with the statutory requirements of RSA 674:22. See MDR Corp. v. Town of Fremont, Rockingham Co. Super. Ct. No. 99-E-644. Notwithstanding this Court order, the Town continued to implement its ordinance and refused to issue building permits to both plaintiffs in these cases, which would have allowed them to build residential homes on pre-approved subdivision lots for prospective buyers. These lawsuits followed.

On March 19, 2001, the Court (McHugh, J.) granted plaintiffs' Motions for Summary Judgment on Liability, finding that plaintiffs were entitled to recover damages for their economic loss as a matter of law because defendants continued to impose their invalid ordinance preventing development. The Court ruled that the economic losses were compensable whether or not a "taking" occurred under existing case law and scheduled an evidentiary hearing on the issue of plaintiffs' economic damages. From the testimony and exhibits presented at the evidentiary hearing, the Court finds and rules as follows:

Plaintiffs are developers of two residential subdivisions in the Town of Fremont. Henry Torromeo and his company, Torromeo Industries (collectively "Torromeo"), developed the Mason's Corner Subdivision, which consists of 27 lots for single family homes. The Fremont Planning Board approved this subdivision for development. Torromeo then filed the approved plan in the Rockingham County Registry of Deeds in February 1997. Torromeo bought this subdivision and acquired its development rights in August 1998.

In January 1999, Torromeo bonded the subdivision project with the Town and began selling lots to builders. The builders then found buyers for the lots, obtained building permits, and began building on each lot in January 1999. By March 1999, when the Town imposed the permanent growth control ordinance, Torromeo had sold 11 out of 27 subdivision lots, to three different builders. However, the Town revoked previously issued building permits on at least two of these lots for the builders' failure to complete substantial construction. This revocation of permits and new substantial construction policy for retention of building permits, caused builders to be wary of purchasing lots in the subdivision. The asserted reasoning for this decline was that builders would not buy lots that they could not develop according to their own timelines, or,

develop at all. Sales continued to gradually decline, and by August 1999 five lots remained unsold. By August 26, 1999, the Town refused to issue further building permits, because its growth control ordinance prohibited their issuance and its maximum capacity for permits had been reached. With no permits available, Torromeo was unable to sell any of the five remaining lots until February 2000, when building permits again were issued.

Torromeo now seeks damages consisting of the fair rental value of his lots from March 1999, when the invalid ordinance took effect, through February 2000, when his remaining lots sold. He additionally seeks carrying costs for each of the five lots, which consist of property taxes, fees to extend letters of credit, insurance costs, accounting costs, and opportunity costs.

Torromeo's project manager and cousin, Vincent Iacozzi, also seeks damages in this action. He asserts that Torromeo promised to sell him Lot #9 in the subdivision, at an extremely discounted rate, and that this lot would be available in May 1999. In reliance, Mr. Iacozzi applied for a building permit for Lot #9 and placed his own home on the market, expecting that the building permit would be issued. Subsequently Mr. Iacozzi's home sold, but the Town denied his building permit. This caused Mr. Iacozzi to incur alleged damages for storing his possessions and renting a home from December 1999 until August 2000, when his home in Mason's Corner was finally completed.

The evidence shows that Mr. Iacozzi did not take title to Lot #9 until June 2001, and that he knew of the problems with the growth control ordinance throughout his tenure as project manager for Torromeo Industries. Moreover, the evidence shows that Mr. Iacozzi did not purchase the lot for fair market value, and, he has never intervened as a party in this case.

Finally, Mr. Iacozzi has not alleged any actions by the Town that prevented him from purchasing a lot for fair market value and obtaining a building permit elsewhere. Accordingly, the Court rules that Mr. Iacozzi's alleged damages are too speculative and too tenuously connected to this case to be determined by the Court.

MDR Corporation, in contrast, was developing a subdivision in Fremont designated as Glidden Hill Estates. The subdivision plan for Glidden Hill Estates consisted of 14 lots for single family homes. The Fremont Planning Board approved this subdivision plan in May 1999. MDR subsequently recorded the plan in the Rockingham County Registry of Deeds in August 1999. After planning board approval but prior to recordation, MDR obtained bonding of the project with the Town, built and paved roads within the subdivision, and began marketing the lots for sale to builders. MDR then applied for, and was granted, five building permits. However, the Town then informed MDR that no further permits would be issued until April 2000 due to the growth control ordinance.

The growth control ordinance ultimately prevented MDR from selling the remaining nine lots in its subdivision for almost one year. Again, the bar to selling the lots was that builders would not buy land on which they could not build. MDR subsequently brought suit in this Court to enjoin the Town from enforcing this ordinance and to declare the ordinance unconstitutional. This suit led to the above-referenced ruling, that the ordinance was invalid ab initio, for failure to comply with statutory requirements for its imposition. MDR Corp. v. Town of Fremont,, Rockingham Co. Super. Ct. No. 99-E-644 (Murphy, J.) (decided December 2000). MDR ultimately received building permits and sold its nine remaining lots by sometime in June 2000. MDR now seeks the fair rental value of

its nine lots from August 1999 through June 2000, as well as the same carrying costs itemized by Torromeo above.

The Court finds and rules that both Torromeo and MDR are entitled to recover damages beginning on August 26, 1999, the date that building permits were no longer available under the invalid growth control ordinance. Contrary to plaintiffs' position, the Court finds that the existence of an invalid growth control ordinance itself does not cause damage. Damage occurs only when the growth control ordinance actually prohibits plaintiffs from receiving building permits. Here, the undisputed testimony shows the damage began on August 26, 1999. Because the building permits were no longer available as of this date, the properties were unmarketable to builders and plaintiffs then suffered damage. See Prudhomme v. Flanagan, 138 N.H. 561, 575 (1994) (finding that damage occurs only when plaintiff can take no further action to improve its own position). Accordingly, the Court rules that Torromeo is entitled to the carrying costs and fair rental value for his five lots from August, 26, 1999 through February 2000 (six months) and MDR is entitled to the same damages for its nine lots from August 26, 1999 through June 2000 (ten months).

MDR and Torromeo retained Joseph G. Fremeau, MAI, and Fremeau Appraisal, Inc., to provide the Court with an expert assessment of their damages. Mr. Fremeau presented the Court with an expert appraisal of plaintiffs' properties, calculating a fair rental value for each lot involved and itemizing all relevant carrying costs. The Town, in turn, retained John M. Crafts, MAI, and Crafts Appraisal Associates, Ltd., to provide the Court with an alternative analysis of plaintiffs' damages.

Mr. Crafts reviewed the Fremeau report and used substantially the same methodology as Mr. Fremeau in arriving at his own appraisal. The only differences in the two appraisal reports are the appropriate market rental rate of return for single

family homes and the appropriate time period for which rental value should be calculated. The Court finds that Mr. Crafts agrees with Mr. Fremeau, by not presenting contrary data, on both the market values for the MDR properties and the carrying costs of each plaintiffs' properties. The Court previously ruled above on the appropriate time period for damages sustained by each plaintiff, finding that the rental period would begin for each plaintiff on August 26, 1999. Accordingly, the only remaining issue in dispute is the appropriate rental value of the properties.

Both experts agreed that the proper method of valuation for the undeveloped subdivision lots was the income capitalization approach based upon the lots' fair market rental value. See In re City of Nashua, 138 N.H. 261, 265 (1998). They arrived at this determination due to the temporary nature of plaintiffs' damages. The experts further agreed that single family building lots are not typically rented on the open market. Thus, comparable rentals were unavailable for comparison in their damage analysis. Accordingly, the experts agreed that the appropriate market rental value must be calculated by applying the appropriate rate of return to the actual fair market value of the property.

The parties agree that the fair market value of MDR's nine Glidden Hills Estates subdivision lots was $660,000. Accordingly, the Court will not disturb this valuation. However, Mr. Fremeau found the value of Torromeo's five Mason's Corner subdivision lots to be $250,000, while Mr. Crafts found their value to be $230,000. Mr. Crafts' estimation of fair market value is derived from the actual sales prices of the five Mason's Corner lots in February 2000. In contrast, Mr. Fremeau's estimation of their fair market value came from comparable sales of similar lots at $50,000 per lot. The Court finds that Mr. Crafts' appraisal is based upon actual market data and that Mr. Fremeau's opinion that one lot sold at less than fair market value is not supported by raw data. Because the expert

appraisal values are close in number, the Court presumes that the sale price of the fifth lot is a reasonable estimation of its fair market value, and it is documented with raw data. Accordingly, the Court adopts Mr. Crafts' $230,000 fair market value estimate for the Mason's Corner lots.

However, the Court adopts Mr. Fremeau's 12% market rate of return, to be applied to these values in determining appropriate market rent. Mr. Fremeau clearly and credibly explained his calculation of this percentage, which was substantiated upon real data in the commercial market. Mr. Fremeau looked to the average rate of return for retail and restaurant sites in the surrounding area, and found that the average rate of return for commercial property hovered somewhere around 10%. Specifically, he compared fast food establishments to gas stations in the surrounding area. Mr. Fremeau then looked to the rate of return on low-risk CD's and Treasury Bills, and learned that this rate hovered around 7%. He further determined that home and commercial mortgage rates in the Fremont area hovered around 9.5%; higher risk stocks received a rate of return greater than 12%; and the Standard and Poor's (S&P) Index had increased more than 12% between mid 1999 and mid 2000. Based upon these averages, and the booming New Hampshire real estate market, Mr. Fremeau determined that a residential lot would receive a slightly higher rate of return, due to its slightly higher market risk on the rental market than would commercial property. Thus, he added two percent to the average commercial rate of return, which also was consistent with the 12% increase in the S&P annual index.

In contrast, Mr. Crafts found that a 7.5% rate of return was more appropriate for the subdivision lots at issue. Mr. Crafts looked to the Town of Fremont bond rating, the commercial lending rate for the Town of Fremont, and additional tax exempt issues within the Town. Mr. Crafts then multiplied these numbers by a 30% tax factor and arrived at an

after-tax rate of approximately 5%. Recognizing that the undeveloped lots under an approved subdivision plan would require some sort of management and upkeep, Mr. Crafts then added 2.5% to the 5% rate to arrive at his final rate of return.

The Court finds Mr. Fremeau's analysis of rates of return to be much more clear, credible, concise, and substantiated upon, real data in the commercial real estate market. Further, Mr. Fremeau's analysis comports with a reasonable person's estimation in a real estate transaction during a booming real estate market. The Court finds that Mr. Crafts' analysis is not premised upon any form of comparable rates of returns and is far too speculative to be adopted. Accordingly, the Court adopts Mr. Fremeau's application of 12% as the appropriate rate of return to apply to the fair market values of the fourteen lots.

Applying this rate of return to the fair market value, the experts testified that the resulting number must be divided by twelve to arrive at a monthly rental rate. Then, this monthly rate is multiplied by the number of months that each plaintiff is entitled to receive a fair rental value. Under this analysis and the rulings enumerated above, the following charts summarize the expert appraisals and the Court's award consistent with the above findings and rulings:

	MDR PROPS. Rental Value	TORROMEO PRPS Rental Value	MDR Costs	TORROMEO Costs
FREMEAU	$660,000*.12	$250,000*.12	$5,600	$10,000
APPRAISAL	=$79,200/12m $6,600*10mo =$66,000 FRV	=$30,000/12m =$2,500*6mo =$15,000 FRV		
CRAFTS	$660,000*.075	$230,000*.075	$5,600	$10,000
APPRAISAL	=$49,500/12m =$4,125*10mo =$41,250 FRV	=$17,250/12m =$1,438*6mo =$8,628 FRV		
COURT	$660,000*.12	$230,000*.12	**$5,600**	**$10,000**
ORDER	=$79,200/12m =$6,600*10m **=$66,000 FRV**	=$27,600/12m =$2,300*6mo **=$13,800 FRV**	UNDIS-PUTED	UNDIS PUTED

For the reasons stated, and based upon the above calculations, the Town is ORDERED to pay Mr. Torromeo $23,800.00 as the appropriate fair rental value and carrying costs for his five unbuildable lots. The Town is further ORDERED to pay MDR Corporation $71,600.00 as its appropriate fair rental value and carrying costs for its nine unbuildable lots. These damages are appropriate based upon the Town's continued imposition of its invalid growth ordinance, which prevented plaintiffs from selling or developing their remaining lots.

Each party has submitted requests for findings of fact and rulings of law. In light of the narrative discussion above, the Court rules upon plaintiff's requests for findings of fact and rulings of law on the Mason's Corner Subdivision as follows:

GRANTED: 1-14; 19-22;

DENIED: 15-18; 24-25 (see decision);

NEITHER GRANTED NOR DENIED: 23 (see decision).

The Court rules upon plaintiff's requests for findings of fact and rulings of law on the Glidden Hill Subdivision as follows:

GRANTED,: 1-13; 17-20;

DENIED 14-16;

NEITHER GRANTED NOR DENIED: 21-22 (see decision).

The Court rules on the Town's requests for findings of fact and rulings of law as follows:

GRANTED: 3-7; 10; 12-13; 21; 26-27; 30;

DENIED: 1-2 (see Order March 19, 2001 (McHugh, J.)); 8; 9 (see decision); 17-20; 28-29; 31-34 (see decision); 17-20; 28-29; 31-34;

NEITHER GRANTED NOR DENIED: 14-16 (see decision); 22-25 (see decision and Order (Murphy, J.) in 99-E-644).

The Court rules on the Town's requests for relief as follows:

GRANTED: B;

DENIED C-G;

NEITHER GRANTED NOR DENIED: A. (The Court will not reverse the prior ruling of law relating to liability in this case. Judge McHugh revisited this issue three times and thoroughly explained his ruling. This ruling is the law governing this case which the Town may appeal at the

conclusion of this litigation) (See Order (McHugh, J.) (dated March 19, 2001)).
So ORDERED.

DATE: September 26, 2001

/s/ Gillian Abramson
GILLIAN L. ABRAMSON
Presiding Justice

APPENDIX C

THE STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS. SUPERIOR COURT

00-C-257
MDR Corporation

V.

Town of Fremont

00-C-256
Henry Torromeo

V.

Town of Fremont

ORDER

The purpose of the within Order is to clarify the issues in these related cases. Although these two cases have never been formally joined, the Court now does so by consent of the parties. Counsel now agree that because the issues raised in these two lawsuits are identical and because the lawyers are the same as well as the witnesses, these cases should be tried together.

Both of these lawsuits were brought as a direct result of a ruling made in case number 99-E-444, MDR Corporation v. Town of Fremont. In that case the Court (Murphy J.) found and ruled that the defendant's Growth Control Ordinance enacted in March of 1987 was invalid ab initio for failing to comply with the statutory requirements of RSA 674:22. Thus because of a procedural defect in the enactment of the Ordinance, it had no validity. Notwithstanding that fact, the Town implemented the

Ordinance and refused both plaintiffs in these cases building permits to enable them to construct residential homes for their perspective buyers.

Both plaintiffs have brought lawsuits seeking monetary compensation for the lost profits that they have suffered as a result of the defendant's implementation of its invalid Growth Control Ordinance. Shortly after the lawsuits were brought, both plaintiffs filed Motions for Summary Judgment on the issue of liability. They argued that because Judge Murphy's determination that the Growth Control Ordinance was invalid, said determination having been affirmed on appeal to our Supreme Court, there were no disputed issues regarding liability. In the defendant's objection to both Motions for Summary Judgment, it took the position that merely because the Growth Control Ordinance was defective procedurally did not mean that it was substantively unconstitutional. The defendant argued that unless a finding was made that the ordinance was substantively unconstitutional then the plaintiffs were not entitled to any monetary damages.

Upon receipt of this Court's Order denying the Motion for Summary Judgment, the plaintiff in 00-C-257 filed a Request for Ruling of Law. In that pleading the plaintiff suggested that the fundamental question to be addressed is not whether the ordinance was substantively unconstitutional, but rather whether the defendants refusal to issue building permits based upon the procedurally invalid Growth Control Ordinance constituted a "taking" of the plaintiff's property as that term is defined under case law. The plaintiff suggested that under case law such a taking did occur for which it was entitled to monetary damages.

By Order dated January 17, 2001, this Court in part agreed with the plaintiff's position. It ruled that "the

determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages but those damages would be limited to economic losses due to its inability to build homes in the period of time that the Town refused to grant building permits". However the Court in effect imposed a higher standard on the plaintiff if it sought to recover other damages in addition to economic loss such as attorney fees.

Upon receipt of the Court's January 17, 2001 Order, the defendant filed a Motion for Reconsideration. In the motion the defendant argued that the substance of the Court's October 5, 2000 denial of the plaintiff's Motion for Summary Judgment on liability and its Order of January 17, 2001, could not be reconciled. While the Court does not agree with the defendant's interpretation of its two prior Orders, it does agree that some clarification is necessary.

The parties have a dispute as to whether or not a legal "taking" has occurred with respect to the defendant's implementation of it [sic] what has been determined to be its invalid Growth Control Ordinance back in 1987. The plaintiff argues that under case law a "taking" did occur; the defendant argues that under the same case law no "taking" resulted.

In the Court's mind, the issue transcends what constitutes a legal "taking". The defendant concedes that for a period of time it refused to allow either of these plaintiffs to obtain building permits based upon what has later been found to be an invalid implementation of its Growth Control Ordinance. Call it what you will, this Court finds and rules that the plaintiff in both of these cases are entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or

not a "taking" occurred under existing case law. It is unconscionable for a municipality to take the position that no damages should be paid when its ordinance restricting building has been determined to be invalid and when the implementation of that Ordinance resulted in provable monetary losses to the plaintiffs.

In retrospect the Court determines that the plaintiffs' Motions for Summary Judgment on liability should have been granted when they were initially filed. Under the within ruling the plaintiffs shall be permitted to place evidence before the Court on their respective claims for economic loss without addressing at all the issue of liability. The plaintiffs do not allege that the defendant is guilty of bad faith in the implementation of its Growth Control Ordinance, however bad faith does not have to be proven if the damages sought are limited to economic loss.

Because of the potential for confusion as a result of this Court's past Orders it determines that the defendant's objection to its findings of liability as a matter of law is timely made and shall be ripe for appeal at the conclusion of the damage phase of this litigation.

Both of these cases have been scheduled for a bench trial with 00-C-257 scheduled on March 28, 2001 and 00-C-256 scheduled on May 1, 2001. Both of those scheduled trials are continued because counsel agree that the cases can be heard together. This Court stands ready to try these cases in either May or June. The Court will be presiding in Belknap County for the month of July and August thus counsel are requested to review their respective calendars for the month of May and June and select a date certain for the one-day trial of these cases and notify the Court within the next ten days.

So ORDERED.

DATE: March 19, 2001

/s/ Kenneth McHugh
Kenneth R. McHugh
Presiding Justice

APPENDIX D

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT
00-C-0257

MDR Corporation

V.

Town of Fremont

ORDER ON PLAINTIFF'S REQUEST
FOR RULING OF LAW

The trial of this case is scheduled for February 2, 2001. It is the plaintiff's position that based upon the order of Judge Murphy in another case involving these same two parties that it does not have to prove liability in order to be able to obtain damages. The plaintiff requests that this Court review Judge Murphy's order and definitively rule prior to trial that in essence the issue of liability is closed.

The plaintiff argues that Judge Murphy's ruling that the Growth Control Ordinance which was enacted by the defendant and found to be invalid ab initio entitles it to damages without any evidence being produced as to the specifics of the Ordinance. It is the position of the defendant that the mere fact that the Ordinance was found to have been improperly enacted does not mean that the Ordinance was found to be unconstitutional. The defendant argues that unless a finding of unconstitutionality is made with respect to the ordinance, the plaintiff is entitled to no damages or the payment of attorney fees. All the plaintiff is entitled to receive as a result of Judge

Murphy's Order is exactly what it did receive, namely the issuance of all of the building permits that it had requested.

As this Court understands the dispute, the determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages, but those damages would be limited to economic losses due to its inability to build homes for the period of time that the Town refused to grant building permits. Because the Court believes the plaintiff can claim these damages under Judge Murphy's existing Order, it finds that the plaintiff does not have to prove the Ordinance is unconstitutional. However Judge Murphy's Order in and of itself would not entitle the plaintiff to claim attorney fees. For that claim, unconstitutionality would have to be proved. Declaring that the Ordinance cannot be applied to the plaintiff because it was not procedurally enacted correctly does not mean the Ordinance is substantively unconstitutional.

In summary, if the plaintiff is willing to reduce its damage claims to that of its losses because of the delay in obtaining building permits, then unconstitutionality of the Growth Control Ordinance need not be proved. However if the plaintiff is seeking attorney fees in addition to its monetary losses occasioned by the delay in building then the plaintiff will have to prove unconstitutionality.

It is hoped that the within Order has clarified the procedural posture of this case. However if either party believes that the issue should be further discussed prior to trial either party may request a hearing and one will be granted within the next ten days.

So ORDERED.

DATE: January 17, 2001

/s/ Kenneth McHugh
Kenneth R. McHugh
Presiding Justice

APPENDIX E

THE STATE OF NEW HAMPSHIRE
Rockingham Superior Court
PO Box 1258
Kingston, NH 03848 1258
603 642-5256

NOTICE OF DECISION

SUMNER F KALMAN
P 0 BOX 988
147 MAIN STREET
PLAISTOW NH 03865-0988

00-C-0257 MDR Corp. vs. Town of Fremont

Please be advised that on 10/03/2000 Judge McHugh made the following order relative to:

Motion for Summary Judgment ; Denied
Re: Issue of Liability "For all of the reasons set forth in the defendant's objection, the within motion is denied."

Raymond Taylor
Clerk of Court

10/03/2000
cc: John J Ryan

APPENDIX F

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2000-100, MDR Corporation v. Town of Fremont, the court upon June 26, 2000, made the following order:

The court having reviewed the notice of appeal and appendix, the decision below is summarily affirmed in accordance with Rule 25(1)(b) on the basis that the trial court has issued an opinion identifying and discussing the issues presented, and the court does not disagree with the opinion. Plaintiff's motion for summary affirmance or, in the alternative, for dismissal or declination is, therefore, moot.

Brock, C.J., and Horton and Broderick, JJ., did not participate; Groff, Mangones, and Mohl, JJ., superior court justices, participated by special assignment under RSA 490:3.

Distribution:

Clerk, Rockingham County Superior Court 99-E-0444
Sumner Kalman, Esquire
John J. Ryan, Esquire
Honorable Walter L. Murphy
Donna K. Nadeau, Supreme Court
File

Howard J. Zibel
Clerk

APPENDIX G

STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS. SUPERIOR COURT

MDR Corporation

v.

Town of Fremont
99-E-444

ORDER

Before the Court is the Plaintiff's Amended Petition for Declaratory Judgment and Injunctive Relief challenging the validity of the Town of Fremont's ("the Town") Growth Control Ordinance and its decision to deny certain building permits to the plaintiff based on that ordinance. MDR brought this action on August 27, 1999 and filed an amendment to the Petition on October 21, 1999. This Court denied MDR's request for temporary injunctive relief on September 23, 1999. The Court conducted a final hearing on the merits on December 6, 1999.

For purposes of this Order, the Court finds the following facts. At the Town Meeting on March 11, 1987, after the forty-three (43) Articles set forth in the warrant were voted on, an oral motion was made, seconded, and passed:

> To see if the Town will vote to authorize the Selectmen to appoint a committee to prepare and submit recommendations to the Planning Board for a Capital Improvement Program; said committee to be composed of eight members, including representatives from the Planning Board, School Board, Police Department, Fire Department, Selectmen, Conservation

> Commission, Parks and Recreation Commission and from the general public.

MDR's Amendment to Petition at ¶ 7, 8. At the first session of the March 1999 Town Meeting, the Town passed a Growth Management and Innovative Land Use Control as part of the Town Zoning Ordinance, replacing an Interim Growth Management Ordinance passed in 1998. Pursuant to the growth management ordinance passed at the March 1999 Town Meeting, on April 14, 1999, the Town Planning Board imposed "Growth Control and Permit Limitations." These limitations provide that, for the period between April 14, 1999 and April 13, 2000, three (3) permits would be issued to lot owners "who do not have vested rights" and twenty-six (26) permits would be issued to all other lot owners.

The plaintiff, MDR Corporation ("MDR") owns a parcel of land in Fremont, New Hampshire known as Glidden Hill Estates, subject to a fourteen lot subdivision plan approved by the Town Planning Board on May 5, 1999 and registered with the Rockingham County Registry of Deeds on August 14, 1999. After the Ordinance had taken effect, MDR applied for six (6) building permits to construct single family homes on the property. The Town granted five (5) permits and told MDR that no further permits would be available until April 2000 at the earliest, citing the Town's 1999 Growth Management Ordinance in support of its decision to deny additional permits.

MDR challenges the legality of the Town's Growth Management and Innovative Land Use Control Ordinance ("the Ordinance"), asserting that the Town has failed to create a valid capital improvement program ("CIP"), as required by RSA 674:22, which states, in relevant part:

> The local legislative body may further exercise the powers granted under this subdivision to regulate and control the timing of development. Any ordinance imposing such a control may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program and shall be based upon a growth management process intended to assess and balance community development needs and consider regional development needs.

RSA 674:22 (emphasis added). The Town's "local legislative body" is the Town Meeting. See RSA 672:8, V. When properly authorized by a majority vote of the Town Meeting, a planning board may "prepare and amend a recommended program of municipal capital improvement projects..." RSA 674:5. "The subject matter of all business to be acted upon at the town meeting shall be distinctly stated in the warrant, and nothing done at any meeting, ... shall be valid unless the subject thereof is so stated." RSA 39:2.

Since the motion to appoint a committee to make recommendations concerning a CIP was not among the forty-three (43) published Articles on the 1987 warrant (see *supra* at 1, 2), the motion was, therefore, invalid. Even if the motion had complied with the notice requirements of RSA 39:2, it did not authorize the creation of a CIP, but rather, purported to authorize the Selectmen to create a committee to make recommendations concerning the substance of a future CIP. Since the motion was not valid, and the Town has not set forth any other evidence that the CIP is otherwise valid, the Town has never adopted a valid or enforceable CIP.

The Growth Control Ordinance, therefore, is invalid *ab initio* for failing to comply with the statutory requirements of

RSA 674:22. Accordingly, MDR's request for Injunctive Relief is, GRANTED. The Town is hereby enjoined from refusing to issue building permits to MDR on the basis of the Growth Control Ordinance. MDR's request for attorney's fees is DENIED.

MDR has submitted requests for findings of fact and rulings of law; however, the Court's findings and rulings are embodied in its narrative discussion above. MDR's requests are **GRANTED** to the extent that they are consistent with this order; otherwise, they are **DENIED.** See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So Ordered.

Date: December 27, 1999

/s/ Walter Murphy
Walter L. Murphy
PRESIDING JUSTICE

APPENDIX H

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Torromeo Industries, Inc.& Vincent Iacozzi

v.

Town of Fremont

99-E-536

ORDER

Before the Court is the Plaintiffs' Petition for Declaratory Judgment Pursuant to RSA 491:22; Bill in Equity; Petition for Permanent Injunction; and Writ of Mandamus. This case arises out of the Town of Fremont's ("the Town") decision to deny plaintiff Vincent Iacozzi's request for a building permit. The Court conducted a final hearing on January 27, 2000.

For purposes of this Order, the Court finds the following facts. Plaintiff Torromeo Industries, Inc. ("Torromeo") owns a parcel of land located in Fremont, New Hampshire known as Mason's Corner. The land is subject to a subdivision plan that was approved by the Town Planning Board and registered with the Rockingham County Registry of Deeds on February 6, 1997. In March 1998, the Town enacted a one-year-long Interim Growth Management Ordinance that restricted the number of building permits to be awarded during that period. Since the enactment of the Interim Ordinance, the Town has awarded building permits for twenty-two (22) of the twenty-seven (27) lots that comprise Mason's Corner.

In a letter dated March 18, 1999, the Town Board of Selectmen informed the plaintiffs that "it is our decision at this time that the Mason's Corner Subdivision project off of North Road in Fremont is exempt from the Interim Growth Management Ordinance under RSA 674:39." Plaintiffs' Exhibit 2. At the first session of the March 1999 Town Meeting, the Town passed a Growth Management and Land Use Control Ordinance that imposed permanent restrictions on the number of building permits to be issued in any given year.

On April 14, 1999, pursuant to the growth management ordinance passed at the March 1999 Town meeting, the Town Planning Board enacted "Growth Control and Permit Limitations." These limitations provided that, for the period between April 14, 1999 and April 13, 2000, three (3) permits would be issued to lot owners "who do not have vested rights" and twenty-six (26) permits would be issued to all other lot owners. See Defendant's Exhibit B. In addition, the Planning Board granted an unlimited number of building permits during the period from April 14, 1999 until June 15, 1999 to any lot owners with "vested" rights, provided that the permits must be acted on within thirty (30) days of issuance. Id.

Plaintiff Iacozzi sold his house in Londonderry, New Hampshire on August 25, 1999, with the intention of purchasing Lot 9 in the Mason's Corner subdivision and building a new house there. To that end, Iacozzi applied for a building permit on September 23, 1999. Citing the Town's Growth Control and Permit Limitations, the Town denied his request thirty days later, stating that all of the available permits for vested lots had already been issued. The plaintiffs now appeal the Town's decision, seeking an injunction to bar the Town from denying the building permit, or alternatively, a writ of mandamus to compel the Town to grant the permit.

The plaintiffs assert that the Town's application of the Growth Control and Permit Limitations against them violates RSA 674:39, which provides in relevant part, that:

> [e]very plat or site plan approved by the planning board and properly recorded in the registry of deeds shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, and zoning ordinances adopted by any city, town, or county ... for a period of 4 years after the date of recording ... .

RSA 674:39. Only "those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements" may be applied to subdivisions during the four-year exemption period. Id. The Town does not deny that the growth control limits are zoning ordinances and does not argue that the limits "expressly protect public health standards." See Beck v. Town of Raymond, 118 N.H. 793, 797 (1978) (Supreme Court rejected town's "public health" argument where "slow-growth" zoning ordinance conflicted with RSA 674:39 predecessor statute). The Town, instead, claims that RSA 674:22 and 674:23, which permit towns to exercise growth management, supersede the four-year exemption. The Town believes that the growth control statutes and the four-year exemption statute are in conflict with each other, and that the growth control statutes must take precedence or become void, since a significant portion of the Town's growth comes from the development of subdivisions.

The Court first notes that RSA 674:23 pertains to interim growth regulations only, and as such, has no application to the present dispute, since the plaintiffs applied for and were denied a building permit under the permanent ordinance provision, after the expiration of the Town's interim growth management ordinance. The relevant language of RSA 674:22 provides that

towns "may further exercise the powers granted under this subdivision to regulate and control the timing of development" and only after the town prepares and adopts a master plan, a capital improvement program, and a growth management process to "assess and balance" the development needs of the community and the region. Given these restrictions on the manner in which a town might control growth, clearly RSA 674:22 does not accord unlimited power to the town to manage growth.

"When interpreting two statutes which deal with a similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." Brosseau v. Green Acres Mobile Homes, 135 N.H. 643; 646 (1992) (quotation omitted); see Sprague Energy Corp. v. Town of Newington, 142 N.H. 804, 806 (1998); 73 Am.Jur.2d, Statutes, § 254 ("Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions"). The Court notes that RSA 674:39 has been amended by the legislature three (3) times (1989, 1991, and 1995) since RSA 674:22 took effect. In the 1991 amendment, (N.H. Laws 1991, 331:4), the legislature announced that the purpose of the amendment was "to confirm and re-emphasize the intent of the general court at the time of the enactment" of RSA 674:39 in favor of protecting new subdivisions from zoning ordinances. See Blue Mountain Forest Ass'n v. Town of Croydon, 119 N.H. 202, 205 (1979) (amendment clarifying former statute is strong evidence of legislature's original intent).

Within the language of RSA 674:39, the legislature specifically excepted from the four-year exemption any

regulations "which expressly protect public health standards, such as water quality and sewage treatment requirements," proving that they were capable of creating exceptions to the four-year limit where they deemed appropriate. Because the legislature has amended RSA 674:39 since the adoption of RSA 674:22, and RSA 674:39 contains a list of specific exceptions to its applicability, the familiar axiom of statutory construction applies, *expressio unius est exclusio alterius:* "normally the expression of one thing in a statute implies the exclusion of another." St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 11-12 (1996); see also Silva v. Botsch, 120 N.H. 600, 602 (1980) ("Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive").

The Court finds and rules that the statutes do not contradict each other, but rather that RSA 674:22 applies to growth management generally, but not to those subdivisions protected by the four-year exemption period of RSA 674:39. The Town's concern over the unfettered development of subdivisions might be addressed by controlling the number and type of subdivisions approved under the power granted by RSA 674:35, rather than by approving a subdivision and then placing zoning restrictions on it later, during the four-year exemption period, in clear violation of RSA 674:39.

The Town further claims that it satisfied RSA 674:39 by issuing an unlimited number of permits between April 14, 1999 and June 13, 1999 in order "to reasonably accommodate any common law or statutory vested rights that any developer of a pre-existing subdivision might have." Def.'s Answer at 4. At oral argument, the Town made an offer of proof concerning school overcrowding in the Town and the measures enacted to accommodate vested property owners. Under the clear language of RSA 674:39, however, it is not unreasonable zoning restrictions that are prohibited, but rather all zoning restrictions,

other than those expressly excepted, for a period of four years. For purposes of this action, the plaintiffs do not challenge and the Court need not address, the reasonableness of the Town's actions, because the application of RSA 674:39 is clear and dispositive.

To be entitled to an injunction, the plaintiffs bear the burden of proving that there "is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." Unifirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) quoting Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982). In addition, the court will balance the hardships to both parties. N.H. Donuts, Inc. v. Skipitaris, 129 N.H. 774, 781 (1987). "The granting of an injunction ... is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." Varney v. Fletcher, 106 N.H. 464, 467-68 (1965).

Accordingly, the plaintiffs' request for Permanent Injunctive Relief is GRANTED. The Town is hereby enjoined from refusing to issue a building permit to plaintiff Iacozzi on the basis of the Growth Control Ordinance. The plaintiffs' request for attorney's fees is DENIED. The plaintiffs have submitted requests for findings of fact and rulings of law; however, the Court's findings and rulings are embodied in its narrative discussion above. The plaintiffs' requests are GRANTED to the extent that they are consistent with this order; DENIED to the extent that they are inconsistent with this order; and NEITHER GRANTED NOR DENIED to the extent that they are irrelevant to the determination of this issue. See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So **Ordered.**

DATE: January 31, 2000

/s/ Richard Galway
Richard E. Galway
PRESIDING JUSTICE

APPENDIX I

New Hampshire Constitution

First Part, Article 12

Protection and Taxation Reciprocal.--- Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

APPENDIX J

New Hampshire Code Annotated

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39:2

Warrant. --

The warrant for any town meeting shall be under the hands of the selectmen, and shall prescribe the place, day and hour of the meeting, and, if there is an election at said meeting, in which an official printed ballot containing more than one name is used, the warrant therefor shall prescribe the time the polls are to open and also an hour before which the polls may not close....The subject matter of all business to be acted upon at the town meeting shall be distinctly stated in the warrant, and nothing done at any meeting, except the election of any town officer required by law to be made at such meeting, shall be valid unless the subject thereof is so stated....

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New Hampshire Code Annotated

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§674:5

Authorization. --- In a municipality where the planning board has adopted a master plan, the local legislative body may authorize the planning board to prepare and amend a recommended program of municipal capital improvement projects projected over a period of at least 6 years. As an alternative, the legislative body may authorize the governing body of a municipality to appoint a capital improvement program committee, which shall include at least one member of the planning board and may include but not be limited to other members of the planning board, the budget committee, or the town or city governing body, to prepare and amend a recommended program of municipal capital improvement projects projected over a period of at least years. The capital improvements program may encompass major projects being currently undertaken or future projects to be undertaken with federal, state, county and other public funds. The sole purpose and effect of the capital improvements program shall be to aid the mayor or selectmen and the budget committee in their consideration of the annual budget.

New Hampshire Code Annotated

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§674:22

Growth Management; Timing of Development.- The local legislative body may further exercise the powers granted under this subdivision to regulate and control the timing of development. Any ordinance imposing such a control may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program and shall be based upon a growth management process intended to assess and balance community development needs and consider regional development needs.

New Hampshire Code Annotated

----------◆----------

§674:39

Four-Year Exemption. --- Every plat or site plan approved by the planning board and properly recorded in the registry of deeds shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, and zoning ordinances adopted by any city, town, or county in which there are located unincorporated towns or unorganized places, except those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements, for a period of 4 years after the date of recording; provided, however, that once substantial completion of the improvements as shown on the plat have occurred in compliance with the approved plat, or the terms of said approval or unless otherwise stipulated by the planning board, the rights of the owner or the owner's successor in interest shall vest and no subsequent changes in subdivision regulations or zoning ordinances shall operate to affect such improvements; and further provided that:

I. Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved plat within 12 months after the date of approval, or in accordance with the terms of the approval, and, if a bond or other security to cover the costs of roads, drains, or sewers is required in connection with such approval, such bond or other security is posted with the city, town, or county in which there are located unincorporated

towns or unorganized places, at the time of commencement of such development;

II. Development remains in full compliance with the public health regulations and ordinances specified in this section; and

III. At the time of approval and recording, the plat or site plan conforms to the subdivision regulations, site plan review regulations, and zoning ordinances then in effect at the site of such plat.

IV. As part of its approval of a plat or plan, the planning board may, with due regard to the scope and details of a particular project, specify the threshold level of work which shall constitute "active and substantial development or building" for purposes of fulfilling paragraph I of this section, or may, for good cause extend the 12-month period set forth in paragraph I.

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APPENDIX K

Town of Fremont "Growth Management and Innovative Land Use Control" Ordinance

* * *

I. AUTHORITY

This section is enacted in accordance with both RSA 674:21 and 674:22.

II. PURPOSES

The purposes of this section of the Zoning Ordinance are as follows:

A. Promote the development of an economically sound and environmentally stable community which considers and balances regional development needs.

B. Determine monitor, evaluate and establish a rate of residential growth in the Town that does not unreasonably interfere with the Town's capacity for planned, orderly, and reasonable expansion of its services to accommodate such growth.

C. Provide a temporary mechanism to allow for phased development of residential projects to manage the impact on municipal services.

D. Provide a temporary mechanism when municipal services are strained or overloaded to reduce the rate of residential growth to allow the Town time to correct any deficiencies that have developed.

E. Protect the health, safety, convenience, and general welfare of the Town's residents.

III. FINDINGS

The Town hereby finds that:

A. The rate of population growth in the Town of Fremont has been among the fastest of any town in the immediate area, in Rockingham County, and in the State of New Hampshire.

B. According to the US Census, Fremont is estimated to have grown by 93.2 percent between 1980 and 1990, and at an annual average rate of 6.81 percent whereas the six abutting communities of Brentwood, Chester, Danville, Epping, Raymond and Sandown have grown by an average annual rate of 4.68 percent, the County at 2.6 percent and the State of New Hampshire averaged 1.88 percent per year during the same period.

C. The number of dwelling building permits (both single family and multifamily) has averaged thirty-three dwelling unit permits per year between 1993 and 1997.

D. Ellis School's current enrollment in 1998 at four hundred thirty is at full capacity.

IV. INDICATORS OF GROWTH IMPACT

The Town hereby determines that the presence of the following conditions constitutes an indicator of growth impact. An indicator of growth impact occurs when:

A. The average annual percent increase in building permits for dwelling units in Fremont for the past five

years exceeds the same average of the combined six abutting communities by 5 percent.

B. The average annual percent population growth in the Town of Fremont in the past five years as reported by the Office of State Planning exceeds the same average of combined six abutting communities by 5 percent.

C. The number of students enrolled or projected for the coming year for any public school in the Fremont School District exceeds 90 percent of its stated capacity as defined by the Fremont School Board.

D. Growth in the annual full value tax rate of Fremont in the last five years as reported by the New Hampshire Department of Revenue Administration exceeds the average rate of the combined six abutting communities of Rockingham County for the same period by 5 percent.

E. The number of dwelling units of all projects combined, for which approval is being sought from the Board, at any time of reporting, if approved, could result in the conditions defined by A, B, C, or D above.

F. The number of students enrolled or projected for the coming year for any public school in the Fremont School System exceeds 100 percent of its stated capacity as defined by the Fremont School Board.

G. The annual capital expenditures including debt service and capital outlay for combined municipal and school department expenditures exceeds 20 percent of the total municipal and school department expenditures

combined.

H. Subsections (A), (8), and (C) are all triggered in the same year.

V. PLANNING BOARD MONITORING

It is the responsibility of the Planning Board to monitor growth in the Town and to report an the following:

A. Annual Dwelling Unit Count: The Planning Board will, by May 15 or other reasonable time of each year, report on the total number of dwelling units existing at the end of its previous calendar year. Existing units mean all those units previously constructed and occupied plus those units constructed and for which Certificates of occupancy were issued in the reporting year.

B. Semi-Annual Reporting: The Planning Board, by May 15 and November 15, or other reasonable times, may report on the number of building permits and Certificates of Occupancy issued for the previous six months for all dwelling units. In the same report the Planning Board shall report on the status, as appropriate, of any phasing requirements of permit limitations in force in the reporting period.

C. Notice of Growth Impact: The Planning Board may, at any time, issue a Notice of Growth Impact, if it has determined that any of the conditions in Article IV exist. Said Notice would include a statement of whether those conditions could result in either VI (Phasing) or VII (Permit Limitations).

D. Periodic Reporting: The Planning Board may, at any time it thinks it is appropriate or necessary, issue

written reports of the status of growth activity in the town, covering such topics as the number of dwelling units or lots being proposed for approval, or for which building permits are being sought, the condition and capacity of any municipal or school facility, the tax burden existing or anticipated on the Town's residents and/or any other topic affecting or related to the growth or finances of the Town.

Pursuant to the monitoring in A-D above, the Planning Board shall make appropriate findings of fact, recommendations for action or take actions provided for in this Section of the Zoning Ordinance as a result of its monitoring and reporting responsibilities.

* * *

VII. LIMITING THE ISSUANCE OF PERMITS

If the Planning Board finds through its monitoring that either A, B, C, D, or E, plus one or more of the indicators F, G, or H has occurred, then the Planning Board may, at its discretion, issue a Notice of Growth Impact in conformance with Article V C to the Board of Selectmen, the Building Inspector, and the general public by posting a notice in the Town Hall and one other Public Place.

A. Interim Permit Limitations. Once a Notice of Growth Impact is issued, then no residential building permits shall be approved by the Building Inspector until after the hearing in Article VIII is held and until after the Planning Board has set the number of permits delineated in Article VIII. The Planning Board shall set the number of permits within fortyfive days of the Notice of Growth Impact being issued.

VIII. PROCEDURES FOR PHASING AND PERMIT LIMITATIONS

Once a Notice of Growth Impact pursuant to Article V C has been issued, then the following procedures will be observed:

A. Planning Board Finding. The Planning Board will issue appropriate findings of fact to accompany any Notice of Growth Impact issued pursuant to Article V C.

B. Public Hearing. Prior to invoking Article VI (Phasing) or Article VII (Permit Limitations), the Planning Board shall hold a public hearing with ten days notice to seek input from the general public.

C. Determination of Action. After a public hearing in Article VIII B, the Planning Board shall deliberate and decide whether (a) phasing should be invoked, (b) permit limitations should be imposed or (c) other appropriate action [sic], and issue its decisions. Any decision will be issued within forty-five days of the Notice of Growth Impact.

D. Permit Limitations. The following provisions shall apply:

(1) The Planning Board, as part of its decision, may specify what limitations are necessary in the issuance of permits for residential units up until and during any corrective action is taken by the Town and/or School District. In determining the number of permits to be issued, the Planning Board shall consider the severity of the municipal service burden, the amount of capacity remaining

in the service, and the amount of time needed to correct the service problem. After determining those facts, the Planning Board shall set the number of dwelling units permits [sic] that can reasonably be issued on an annual basis.

(2) After the public hearing, the Planning Board shall set the number of permits to be issued for the one year period following enactment of the limit, or such other shorter period as may be desirable. At the end of the year, or such other shorter period, the Planning Board shall hold a hearing to determine if the permit limitation should be removed or altered. After making findings of fact, the Planning Board may (a) extend the permit limitation, (b) alter the permit limitation, or (c) remove the permit limitation.

E. Phasing. The Planning Board, as part of its decision, may require phasing in accordance with the provisions of Article VI (Phasing).

F. Equitable Distribution: In order to insure equitable distribution of available permits, no individual, partnership, corporation, or other entity or its related or affiliated entities or, in the case of individuals, their relatives or persons associated in business, may receive more than 20% of the permits or six units, whichever is less, available during the limitation period.

* * *

APPENDIX L

PLANNING BOARD
TOWN OF FREMONT, NEW HAMPSHIRE

NOTICE OF DECISION

You are hereby notified that the Fremont Planning Board held a Public Hearing on April 14, 1999 and voted, pursuant to the Notice of Growth Impact, to impose the following restrictions on the issuance of building permits for the periods referenced.

GROWTH CONTROL AND PERMIT LIMITATIONS

1. The Planning Board establishes a category of building permits which shall be available to lot owners who do not have vested rights, but request building permits solely for the purposes of the construction of single family residential dwellings for the owner's principal residence. The number of these permits available for the year beginning April 14,1999 and ending April 13, 2000 shall be three (3). Any applicant for such a permit shall be limited to one permit, and the applicant shall execute an affidavit in the form prescribed by the Building Inspector which shall affirm that the permit and the construction thereunder is solely for the purposes of a single family residence for that applicant/lot owner.

2. For lot owners who do not fall under the above Paragraph I category, the Board hereby determines that the total number of building permits otherwise available in the year beginning April 14 1999 and ending April 13, 2000 shall be twenty six (26) permits.

3. In order to adequately recognize the rights and interests of property owners who may have vested rights and those

who may not have vested rights, but do not fall under the Paragraph I category, and to provide for an equitable allocation and distribution of building permits during the above period, and to prevent the procurement of permits not intended for reasonably immediate use, the rules regarding the issuance of permits under Paragraph 2 above are as follows:

A. Prior to June 15, 1999, property owners with vested rights only shall be entitled to make application for building permits regardless of whether the number of such permits shall exceed the limit recited under Paragraph 2 above. If, as of June 15, 1999 or anytime thereafter, the total number of permits issued shall not exceed the number listed under Paragraph 2 above, any property owner shall be entitled to make application for building permit on a first come first serve basis.

B. Any permit issued under Paragraph A above which shall not be acted upon thirty (30) days from the date of its issuance or if issued prior to the date hereof, then thirty (30) days from this date, shall lapse and for such lapse(s) shall be deemed to reduce the number of permits issued for the purposes of whether additional permits are available to be issued.

C. The Planning Board or the Board of Selectmen or their agent shall be authorized to advise and instruct the. Building Inspector as to whether any lot or property which shall be the subject of a building permit application shall be entitled to vest right status under Paragraph A above.

D. The building Inspector shall be entitled to determine whether the recipient of any building permit shall have acted on the permit within the time limitations under Paragraph B above. The Building Inspector shall consider the extent and degree of construction, site preparation or other factors evidencing actual intent to commence and complete construction under the building permit. If the building Inspector shall determine that the permit shall not have been acted upon and shall have lapsed he shall issue a notice of same to the holder of the permit and that permit shall be deemed of no further validity or effect.

Michael Tuscano, Chairman

APPENDIX M

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 12, 2003

Mr. Sumner F. Kalman
147 Main Street
P.O. Box 988
Plaistow, NH 03865

Re: Henry Torromeo and MDR Corporation v. Town of Fremont, New Hampshire Application No. 02A670

Dear Mr. Kalman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on February 12, 2003, extended the time to and including April 14, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk

By

Jeffrey D. Atkins
Assistant Clerk

Supreme Court, U.S.
FILED
MAY 9 2003
OFFICE OF THE CLERK

(2)

No. 02-1507

In the Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,
Petitioners,

v.

TOWN OF FREMONT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. RYAN, ESQ.
Counsel of Record

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Counsel for Respondent

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

12 pp

RESTATEMENT OF QUESTIONS PRESENTED

Where a State Court invalidated a municipal land use ordinance due to a procedural defect is every permit denial made under the ordinance prior to the invalidation an unconstitutional taking of property.

TABLE OF CONTENTS

PAGE

RESTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REQUEST TO DENY CERTIORARI 1

COUNTER STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. Decision Below Does Not Present a Conflict 3

II. No "Taking" Occurred 6

III. The Decision Below Was Correct 7

CONCLUSION 7

TABLE OF AUTHORITIES

PAGE

Agins v. City of Tiburon, 447 U.S. 254 (1980) 4

Amey v. Pittsbury School District,
95 NH 386, 64 A.2d 1 (1949) 4

Barcomb v. Herman,
116 NH 318, 358 A.2d 400 (1976) 4

City of Monterey v. Del Monte Dunes,
526 U.S. 687 (1999) 4-5

Cumberland Farms, Inc. v. Town of Groton,
719 A.2d 465 (Conn. 1998) 5

Eberle v. Dane County Board of Adjustment,
595 N.W.2d 730 (Wis. 1999) 5

Hecker v. McKernan,
105 NH 195, 186 A.2d 38 (1963) 4

Nollan v. California Coastal Comm'n.,
483 U.S. 825 (1987) 4, 6

Penn Central Transp. Co. v. City of New York,
483 U.S. 104 (1978) 6

Tahoe Sierra Preservation Council v.
Tahoe Regional Planning Agency,
535 U.S. 302 (2002) 5

Tahoe Sierra Preservation Council v.
Tahoe Regional Planning Agency,
216 F.3d 764 (9th Cir. 2000,
aff'd, 535 U.S. 302 (2002) 5

REQUEST TO DENY CERTIORARI

Respondent Town of Fremont requests that this Court deny the Petition for Certiorari ("Pet") filed by Henry Torromeo and MDR Corporation seeking review of the decision of the Supreme Court of New Hampshire entered in this case on December 13, 2002.

COUNTER STATEMENT OF THE CASE

In March 1999 the Town of Fremont enacted a Growth Control Ordinance (Pet. App. at K-45, 52). In August of 1999 the Plaintiff, MDR filed its action alleging that the denial of building permits applied for by MDR was improper and challenged the validity of the Town's Growth Control Ordinance. Similarly, the Plaintiff Torromeo also brought an action contesting the legality of the denial of building permits. On December 27, 1999, the New Hampshire Superior Court (Murphy J.), issued its decision in the MDR case. (Pet. App. at G-28). The Court held that at the Fremont Annual Town Meeting in 1987, the vote taken at that meeting did not properly authorize the Planning Board of the Town of Fremont to prepare a Capital Improvement Program under RSA 674:5 (Pet. App. at 41). The Court also held that as a result of the defective 1987 vote, the statutory requirement under RSA 674:22 (Pet. App. at 42) requiring a Capital Improvement Program as a basis for a Growth Control ordinance had not been met despite the actual existence of Capital Improvement programs since 1987, and invalidated the Town's 1999 Growth Control Ordinance. The Town seasonably filed its appeal of that decision (New Hampshire Supreme Court Case #2000-100). Prior to the Court's ruling on that appeal, the Torromeo case was heard on January 27, 2002 with an order issued on 1/31/00 (Pet. App. at H-32). That case was decided on different

grounds than the MDR case, in favor of the Plaintiff, and the Town immediately issued the building permits requested by the Plaintiff in February of 2000. On June 26, 2000 the New Hampshire Supreme Court issued its Order declining the appeal filed by the Town in the first MDR case (Pet. App. at F-27). Immediately thereafter the Town issued the building permits requested by the Plaintiff MDR. Thus, in both instances the building permits were not withheld beyond the judicial disposition of those cases, and the Petitioners' assertion or implication that the Town applied an Ordinance after it was declared illegal is erroneous (Pet. at 2).

The present cases were filed on March 21, 2000, were thereafter consolidated for trial, with a decision awarding damages to the Petitioners issued on September 21, 2001 (Pet. App. at B-7).

The Town filed its appeal which resulted in a reversal of the damage award (Pet. App. at A-1). In essence the New Hampshire Supreme Court held that absent any claim or proof that the Growth Control Ordinance at issue was unconstitutional, inverse condemnation damages representing the loss of monetary value during the period of the enforcement of the Ordinance, could not be awarded. Rather, the Court held that since the defect in the Ordinance which led to the finding that it could not be enforced was procedural in nature, the Petitioners remedy was the injunctive equitable remedy of the issuance of the building permits (which the Town had performed as stated above). Therefore, this is <u>not</u> a case where the Growth Control Ordinance was challenged on constitutional grounds or a case where once having been told that the Ordinance was unenforceable, the Town nevertheless continued to apply the Ordinance.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Present a Conflict.

Contrary to the assertions made by the Petitioners, the New Hampshire Supreme Court did not misapply established constitutional precedent. As noted by the New Hampshire Supreme Court in its decision, the Ordinance in question was not invalidated by reasons related to any constitutional provisions, but rather by reason of a procedural defect (Pet. App. at A 5-6).

The Petitioners do not dispute that the Town had a legitimate interest in controlling growth as authorized by that statute (Pet. at 2). The Town's Growth Control Ordinance was not challenged as failing to pursue that interest, or was otherwise arbitrary or unreasonable. The focus of the Petitioners' assertions in the cases which proceeded this case related to the alleged lack of certain procedures and proper language at a 1987 Town Meeting which had attempted to comply with the State statute related to the formulation and adoption of a Capital Improvement Program by a Planning Board which is one of the requisites to a Growth Control Ordinance under RSA 674:22 (Pet. App. at 42). In 1999 the Petitioner MDR alleged that the 1987 Town Meeting was defective and that the Capital Improvement Program then adopted by the Planning Board as of 1999 was not properly authorized.

The New Hampshire Superior court found that a defect did exist and also ruled that as a consequence the Growth Control Ordinance (Pet. at G-28) was invalid. This decision was appealed and it was not until the New Hampshire Supreme Court rendered its decision (Pet. App. at

F-27), that the determination that a defect did exist become final.

The defect which led to the invalidation of the Growth control Ordinance bore no relation to the substance of the Ordinance itself and was confirmed as procedural error only (Pet. App. at 18). There is a major difference between an ordinance which is found to be unreasonable, arbitrary and therefore an unconstitutional exercise of the police power, and an ordinance which is found invalid only by reason of procedural irregularities related to a component of the enabling statute (RSA 674:22 - Pet. App. at 42). Courts are routinely called upon to determine whether procedural requirements related to the enactment of land use ordinances have been complied with. See e.g. Barcomb v. Herman, 116 NH 318, 358 A.2d 400 (1976); Amey v. Pittsburg School District, 95 NH 386, 64 A.2d 1 (1949); Hecker v. McKernan, 105 NH 195 186 A.2d 38 (1963).

In cases involving invalidation of a land use ordinance by reason of a procedural defect, such as in this case, it cannot be found that the Town subjected itself to liability for inverse condemnation damages where it enforced an Ordinance prior to the time that the Courts ruled on the procedural legal issue. In Agins v. City of Tiburon, 447 U.S. 254 (1980), the Court observed that local growth control laws like the Fremont Ordinance substantially advanced legitimate government interests in protecting citizens against "the ill effects of urbanization" and the "premature and unnecessary conversion of open-space land to urban uses" Id. at 261. Nothing in this Court's taking juris-prudence suggests that a procedural defect in the adoption of such a growth control ordinance undermines those interests or gives rise to takings liability. See Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) See also, City of Monterey v. Del Monte

Dunes, 526 U.S. 687 (1999); Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). The Petitioners theory that every invalidation of a land use ordinance constitutes grounds for a takings claim where a permit was denied during the enforcement period, is unprecedented.

Consequently, the Petitioners' assertion that the Ordinance did not advance a legitimate state interest is erroneous The Town had every right to defend against the procedural issue raised by the Petitioner MDR and seek a Court ruling as to whether the State statutes related to the adoption of a Capital Improvement program had been complied with, and to apply the Ordinance to the Petitioner prior to the Courts' rulings on the issue.

Furthermore, the Petitioners attempt to discern a "conflict" in state cases also fails. Petitioners fail to cite any case that adopts the Petitioners allegation that a routine, procedural defect in a land use ordinance automatically gives rise to a federal constitutional takings claim by anyone whose application for a permit was denied under the ordinance prior to its invalidation by a later Court decision. The cases cited by the Petitioners (Pet. at 26-27) to show a purported split of authority Cumberland Farms, Inc. v. Town of Groton, 719 A.2d 465 (Conn. 1998), Eberle v. Dane County Board of Adjustment, 595 N.W. 2d 730 (Wis. 1999), and Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000 aff'd, 535 US 302 (2002), all stand only for the unremarkable proposition that compensation is the appropriate constitutional remedy for a taking, and that a compensable temporary taking occurs where the government rescinds an action that otherwise would be a permanent taking. Nothing in those cases supports the Petitioners novel theory presented in their Petition.

Furthermore, the Petitioners reliance on Nollan (Pet. at 13), is misplaced. Nollan involved a permit condition that required the landowner to dedicate land to the public, and it holds only that such compelled dedications warrant careful scrutiny because they present a heightened risk that the government might be sidestepping its constitutional obligation to acquire land upon the payment of just compensation. Nollan provides no support for Petitioners' argument that a permit denial under a procedurally defective land use ordinance engenders an automatic takings claim.

Finally, the Petitioners reliance on Penn Central Transp. Co. v. City of New York, U.S. 104 (1978), is misplaced. The Petitioners fail to cite the Penn Central case or its holding in its Supreme Court proceedings; therefore any argument based on that case has been waived and is not properly before this Court. In addition the Petitioners fail to cite a single case from the U.S. Supreme Court or any other Court in which the kind of procedural defect found in this case was given any significant weight in takings analysis under Penn Central's "character of government action" prong or test.

II. No "Taking" Occurred

The Petitioners assert that a "taking" occurred under the 5th Amendment to the US Constitution by the application of an illegal ordinance (Pet. at 21). The period of the alleged "taking" related to the time between the enactment of the Ordinance (March 1999), to the dates when the Town issued the requested building permits. During that period the contest over the whether the Ordinance was valid due to the alleged procedural error discussed in Section I above was in process. Thus, the issue of a taking could not arise until after the Court's had ruled on that issue. As pointed out

previously, immediately after the new Hampshire Superior Court decisions became final, the Town issued the requested permits.

III. The Decision Below Was Correct

The New Hampshire Supreme Court's reasons for reversal of the damages awards to the Petitioners was grounded in solid fundamental constitutional law principles. The Ordinance must be proven to be arbitrary or unreasonable, there must be a taking, and the constitutionality of the regulations must be challenged (Pet. App. at A-5). None of these elements is present in this case.

CONCLUSION

For the above cited reasons, the Petition should be denied.

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No. 02-1507

In The
Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION
Petitioners,

v.

TOWN OF FREMONT
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Hampshire

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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May 16, 2003

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28 pp

MOTION FOR LEAVE TO FILE AS *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Defenders of Property Rights ("Defenders") requests leave to file the accompanying *amicus curiae* brief in support of the Petition for Writ of Certiorari. Petitioners Henry Torromeo and MDR Corporation have consented to the filing of this brief; Respondent Town of Fremont has not.

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights.

This case concerns an alleged violation of the Just Compensation clause of the Fifth Amendment in the context of a temporary taking of private property. Defenders believes that the guarantee of the Fifth Amendment must be uniform in all states and, further, that the rule adopted by the Supreme Court of New Hampshire and some other state courts is utterly inconsistent with that guarantee. Allowing local governments to avoid the constitutionally required remedy of just compensation for an ordinance that temporarily deprives a property owner of the property's use and value, simply based on a finding that the ordinance was invalid from the beginning, undercuts a fundamental constitutional right of private property owners and frustrates the intent of the Fifth Amendment. Defenders will provide additional information on these issues that will assist this Court in deciding if it should hear this case.

Accordingly, Defenders respectfully moves that this Court grant its motion to file the accompanying *amicus curiae* brief in support of the Petition for Writ of Certiorari in this case.

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QUESTION PRESENTED

Amicus curiae will address the following issue presented for review:

When a local government enacts a growth management ordinance in the general scope of its authority that deprives a property owner temporarily of economic use of his property, can the local government avoid paying Just Compensation under the Fifth Amendment based on a finding that the growth ordinance was invalid from the start due to a procedural defect in its enactment?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

BRIEF IN SUPPORT OF PETITIONERS.....1

IDENTITY AND INTEREST OF *AMICUS CURIAE*.....1

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE PETITION.....4

I. This Court's Intervention Is Needed to Ensure That States Consistently Interpret The Fifth Amendment Guarantee of Just Compensation for Temporary Takings.....4

II. Permitting Invalidation as a Substitute Remedy for Just Compensation Invites the Risk of Regulatory Gamesmanship.....16

CONCLUSION.....19

TABLE OF AUTHORITIES

Cases **Page**

520 E. 81st Street Associates v. State, 780 N.E.2d 518 (N.Y. 2002).....7

Armstrong v. United States, 364 U.S. 40 (1960).....18

Boling v. United States, 41 Fed. Cl. 674 (1998), *rev'd on other grounds*, 220 F.3d 1365 (Fed. Cir. 2000).....15

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U.S. 226 (1897).....15

Chioffi v. City of Winooski, 676 A.2d 786 (Vt. 1996)...12, 13

Cumberland Farms, Inc. v. Town of Groton, 719 A.2d 465 (Conn. 1998).....6

Del Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998).....14

Dolan v. City of Tigard, 512 U.S. 374 (1994).....16

Eberle v. Dane County Bd. Of Adjustment, 595 S.W.2d 730 (Wisc. 1999).....7

Eldred v. Ashcroft, 123 S. Ct. 769 (2002).....13

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).....*passim*

Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188 (Calif. 1998).....12, 13

Mapp v. Ohio, 367 U.S. 643 (1961).....15

Marbury v. Madison, 5 U.S. 137 (1803).....14

Miller & Sons Paving, Inc. v. Plumstead Township, 717 A.2d 483 (Pa. 1998).....8

Pheasant Bridge Corp. v. Township of Warren, 777 A.2d 334 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002).....12

Pi Electronics Corp. v. United States, 2003 U.S. Claims LEXIS 26 (Ct. Fed. Cl. 2003).....15

Rith Energy, Inc. v. United States, 247 F.3d 1355 (Fed. Cir. 2001).....14

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1980).....11, 18

SDDS, Inc. v. State of South Dakota, 650 N.W.2d 1 (S.D. 2002).....8

Sintra, Inc. v. City of Seattle, 935 P.2d 555 (Wash. 1997).....7, 9

Steinbergh v. City of Cambridge, 604 N.E.2d 1269 (Mass. 1992).....7

State ex rel. Shemo v. City of Mayfield Heights, 765 N.E.2d 345 (Ohio 2002).....8

Tampa-Hillsborough County Expressway v. Authority v. A.G.W.S. Corp., 640 So. 2d 54 (Fla. 1994).....6

United States v. Morrison, 529 U.S. 598 (1999).....14

Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401 (Neb. 1994).....7

Woodland Manor, III Assocs., L.P. v. Reisma, 2003 R.I. Super. LEXIS 35 (R. I. Super. Feb. 24, 2003).....9

Constitutional Provisions

U.S. CONST. amend. V.....5

Statutes, Regulations, and Rules

LA. REV. STAT. ANN. § 3:3610 (2003).....10

MISS. CODE ANN. § 49-33-9 (2003).....10

TEX. GOV'T CODE §2007.023 (2002).....12, 13

Secondary Sources

RICHARD BABCOCK, THE ZONING GAME (1966).....17

John D. Echevarria, *Takings and Errors*, 51 ALA. L. REV. 1047 (2000).....11

Douglas Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 IND. L.J. 45 (1982).....17

BRIEF IN SUPPORT OF PETITIONERS*

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of Northern*

Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

Henry Torromeo wanted to develop a 27-lot residential subdivision called Mason's Corner in Fremont, New Hampshire. MDR Corporation wanted to do the same with a 14-lot subdivision in Fremont it owned in Fremont called Glidden Hills Estates. In September 1999, the Town of Fremont denied Torromeo and MDR building permits because of a local growth control ordinance, leaving petitioners with no use of their land. By that time, Torromeo

and MDR had collectively sunk $1 million into their subdivision roads. They could not build in the subdivision, had nothing of value to sell, and could not relocate to develop elsewhere, their capital being sunk in Fremont.

Torromeo and MDR filed separate suits for injunctive relief to compel issuance of the building permits. The Superior Court ordered issuance of the permits in December 1999, ruling that the growth control ordinance under which the permits were denied was invalid *ab initio* because the Town had not adopted a capital improvement program, the statutory prerequisite to a growth control ordinance. The Town issued the permits in February 2000.

Torromeo and MDR received no just compensation for the six-month period during which they could make no beneficial or productive use of their land. They filed separate suits in Superior Court to recover just compensation under the state and federal Constitutions. The Superior Court awarded Torromeo and MDR compensation for the carrying costs and fair rental value of the undeveloped lots, ruling that

petitioners did not have to prove the unconstitutionality of the growth control ordinance to recover just compensation, as the Town had argued at the damages phase. The Town appealed to the Supreme Court of New Hampshire.

The Supreme Court of New Hampshire reversed the award of just compensation, finding that the proper remedies for this "mere municipal error" were limited to invalidation of the ordinance and issuance of the previously denied building permits, despite the economic loss to petitioners. Torromeo and MDR petition this Court to review the decision of the New Hampshire Supreme Court.

REASONS FOR GRANTING THE PETITION

I. This Court's Intervention Is Needed to Ensure That States Consistently Interpret the Fifth Amendment Guarantee of Just Compensation for Temporary Takings

Sixteen years ago, this Court reversed the holding of the California Supreme Court that "when an ordinance . . . deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly

mandamus." *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 308 (1987). The *First English* Court held that:

> 'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation . . . The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment[1] requires that the government pay the landowner for the value of the use of the land during this period.

482 U.S. 304, 318-319. The *First English* Court was clear as to what remedy the Constitution required for temporary regulatory takings--just compensation. *See* 482 U.S. 304, 320 ("Invalidation of the ordinance . . . , though converting the taking into a temporary one, is not a sufficient remedy to meet the demands of the Just Compensation Clause").

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[1] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

Despite the *First English* decision, however, the highest courts of many states have reached diametrically opposite conclusions on whether an authorized but invalid action of local government constitutes a taking for which the Fifth Amendment guarantees just compensation. Despite the clear holding of this court that temporary takings are compensable, many state courts appear confused about whether all such takings are compensable.

Connecticut, Florida, Louisiana, Mississippi, Massachusetts, Nebraska, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, and Wisconsin have required compensation for all temporary takings, including those worked by invalid regulations. *See, e.g., Cumberland Farms, Inc. v. Town of Groton*, 719 A.2d 465, 474 (Conn. 1998) (town's improper denial of variance did not preclude Just Compensation claim); *Tampa-Hillsborough County Expressway v. Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994) (as-applied takings challenges to a Florida map reservation statute were unaffected by finding that statute

violated Due Process Clause); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. 1992) (regulatory takings challenge to rent control ordinance could go forward regardless of previous ruling that ordinance was ultra vires); *Sintra, Inc. v. City of Seattle,* 935 P.2d 555 (Wash. 1997); *Eberle v. Dane County Bd. Of Adjustment*, 595 S.W.2d 730 (Wisc. 1999) (developer's temporary takings action under state constitution was not barred by the fact that delay resulted from board's improper denial of zoning variance).

For example, the Nebraska Supreme Court held that the unenforceability of a zoning ordinance and the arbitrariness and capriciousness of the permit denials issued thereunder did not relieve the city of its duty to pay compensation to the aggrieved property owner. *See Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994). The New York Court of Appeals held that an invalid rent control exemption that caused a temporary taking did not preclude an award of just compensation. *See 520 E. 81st Street Associates v. State*, 780 N.E.2d 518

(N.Y. 2002). The Ohio Supreme Court agreed that the invalidity of a rezoning did not bar the award of just compensation to the property owners afflicted during the rezoning's effective period. *See State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002). Pennsylvania likewise agreed that "in a takings inquiry, however, the question is whether the governmental action effectively deprived the landowner of all beneficial use of his property, regardless of whether the action in question was a valid exercise of governmental power." *See Miller & Sons Paving, Inc. v. Plumstead Township,* 717 A.2d 483, 486 (Pa. 1998).

The Supreme Court of South Dakota has neglected to explore any remedy for a temporary taking other than just compensation, which, it held, formed the outer parameters of the available remedy for a temporary taking. *See SDDS, Inc. v. State of South Dakota*, 650 N.W.2d 1, 10-11 (S.D. 2002) ("states should be free to experiment in the implementation of this rule, provided

that their chosen procedures and remedies comport with the fundamental constitutional command [of just compensation]"). Washington allowed just compensation for a temporary taking caused by a housing ordinance struck down on substantive due process grounds. *See Sintra, Inc. v. City of Seattle,* 935 P.2d 555 (Wash. 1997).

The Superior Court of Rhode Island held recently that a landowner that has "successfully freed its land" from the state's Department of Environmental Management's demand that he submit a new development permit application via invalidation is entitled to just compensation. *See Woodland Manor, III Assocs., L.P. v. Reisma,* 2003 R.I. Super. LEXIS 35, 46 (R. I. Super. Feb. 24, 2003). In so holding, that court relied on First English's holding that invalidation "was not a sufficient remedy to meet the demands of the Just Compensation clause." *See id.*

A few states have codified the holding in *First English* to ensure that state agencies and political subdivisions pay just compensation for temporary takings of

private property after the regulation is found invalid. Louisiana authorizes the owner of agricultural or forest land to bring an action against a state or local government agency if a rule or regulation has reduced the value of that land by twenty percent or more. Louisiana law also mandates that, even "if such rule or regulation is rescinded or repealed," "the governmental entity shall be liable for damages sustained by the property owner to his affected property which were caused by the application of the rescinded or repealed rule or regulation." *See* LA. REV. STAT. ANN. § 3:3610 (2003).

Similarly, Mississippi gives state governmental entities the option of rescinding rules or regulations that reduce the value of agricultural or forest land by more than forty percent, but still requires them to pay the aggrieved property owner if they opt to rescind the offending regulation. *See* MISS. CODE ANN. § 49-33-9 (2003) ("Subsequent repeal of the action by the state after a decision

has become final shall not entitle the state to refuse payment . . .").

The states interpreting First English in this manner focus on the property owner's resulting loss. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 652 (1980) (Brennan, J. dissent) ("From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it").

Other states have restricted the scope of protection for landowners afflicted by temporary takings, removing the focus from the property owner's loss by barring a takings remedy where landowners successfully procured the invalidation of the offending regulation. California, New Jersey, Texas, and Vermont have precluded takings claims based on authorized but invalid regulation. *See* John D. Echevarria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1057 (2000). These cases reject temporary Just Compensation

claims on the grounds that only lawful and valid government action gives rise to takings liability. *See Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188 (Calif. 1998); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 344 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002); *Chioffi v. City of Winooski*, 676 A.2d 786 (Vt. 1996) (city's erroneous denial of variance application barred Just Compensation claim). *See also* TEX. GOV'T CODE §2007.023 (2002).

The Supreme Court of New Jersey has held that just compensation was not required in the case of "an invalid ordinance in which government went beyond the scope of its zoning power" in working a taking. *See Pheasant Bridge Corp.*, 777 A.2d at 344. That court held that interim monetary damages were not constitutionally required for "regulatory delay in securing a change in, or variance from, a zoning ordinance and delay occasioned by resort to judicial processes to challenge application of a zoning ordinance to one's property." *See id.* California also excludes just

compensation as a remedy for erroneous government conduct that temporarily deprives a property owner of economic and beneficial use of his property. *See, e.g., Landgate*, 953 P.2d at 1995 ("legally erroneous decision of a government agency" is merely a "regulatory mistake" that cannot be compensated as a taking). Vermont likewise held the reversal of an improper denial of a building permit to be mere "regulatory delay" barring a temporary takings claim. *See Chioffi*, 676 A.2d at 788.

Texas permits a state agency to elect paying compensation to property owners whose property value is reduced by twenty-five percent or more. *See* TEX. GOV'T CODE §2007.023 (2002). That is, rescinding the action remains a viable substitute under Texas law for just compensation.

This is not mere inconsistency—it is denial of constitutional guarantees. The role of this court is to declare what the constitution means, and to provide this guidance to the state courts. *See, e.g., Eldred v. Ashcroft,* 123 S. Ct. 769,

801 (2002); *United States v. Morrison*, 529 U.S. 598, 616 (1999); *Marbury v. Madison,* 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

State courts interpreting *First English* to exclude authorized but invalid regulation from the ambit of temporary takings liability add another layer of confusion to takings jurisprudence. In cases against the federal government, the courts have generally rejected the argument that an invalid statute or regulation cannot give rise to a taking.

Property owners who suffer regulatory takings at the hands of the federal government can hold government liable for actions that are authorized but invalid on other grounds. A Just Compensation claim against the federal government is established "as long as the government's action was authorized, even if the government's action was subject to legal challenge on some other ground." *See Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001). *See also Del Rio Drilling Programs, Inc. v. United* States, 146

F.3d 1358, 1362 (Fed. Cir. 1998); *Pi Electronics Corp. v. United States,* 2003 U.S. Claims LEXIS 26, 32 (Ct. Fed. Cl. 2003). Consequently, neither good faith mistake on the part of the federal government, see *Del-Rio Drilling*, 146 F.3d at 1363, nor negligence, *see Boling v. United States*, 41 Fed. Cl. 674, 679 (1998), *rev'd on other grounds*, 220 F.3d 1365 (Fed. Cir. 2000), bars a Just Compensation claim against the federal government for otherwise authorized action.

The Fifth Amendment guarantee of Just Compensation is a federal constitutional right that binds the states, *see Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1897), and must be interpreted consistently by them. *See, e.g., Mapp v. Ohio,* 367 U.S. 643, 656 (1961). Imagine the public outcry if interpretations of free exercise of religion, freedom of speech, freedom of peaceable assembly, and the right against compelled self-incrimination varied from state to state. The Constitution requires the same consistency with respect to the Fifth Amendment right to Just Compensation, no "poor relation" among constitutional guarantees. *See*

Dolan v. City of Tigard, 512 U.S. 374, 392 (1994). This Court's intervention is needed to ensure that this federal constitutional provision receives the same interpretation at both the state and federal level.

II. Permitting Invalidation as a Substitute Remedy for Just Compensation Invites the Risk of Regulatory Gamesmanship

The economic concerns of property owners at stake in this case also demand this Court's intervention. The Just Compensation requirement ensures that the burden of regulation that deprives property of economic value falls on the public rather than on the property owner. Allowing local governments to avoid paying just compensation for a regulatory taking based on the initial invalidity of the offending regulation invites abuse and gamesmanship on the part of state and local governments. The property owner who succeeds in having an authorized but otherwise invalid regulation struck down leaves the government free to return

to the regulatory drawing board. *See* Douglas Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 IND. L.J. 45, 51 (1982). As one commentator has pointed out, invalidation as a substitute remedy leaves the property owner at a perpetual disadvantage:

> You have obtained a decision that the single-family classification of your client's property is unreasonable. Your client wants to use the property for commercial purposes. The community immediately rezones the property to a Duplex Zone and invites you to spend another two years and thousands of dollars litigating that classification.

RICHARD BABCOCK, THE ZONING GAME 13 (1966).

Under an invalidation-only regime, governments can, at no cost, simply enact defective land use regulation after defective land use regulation, knowing that they will never be liable for just compensation. Property owners, on the other hand, bear the cost of the regulation and the cost of challenging the regulation.

Because it properly allocates the burdens of government action in the property context, the Just Compensation requirement serves as the only means to

discourage this regulatory abuse and gamesmanship. *See San Diego Gas & Electric Co.*, 450 U.S. at 656 (Brennan, J. dissent) ("[M]ere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole"). Just compensation, not invalidation, reallocates the burden of regulation back to the public, where, in "all fairness and justice," it "should be borne." *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to grant the Petition for Writ of Certiorari.

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In the

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HENRY TORROMEO and MDR CORPORATION,

Petitioners,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Hampshire

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS HENRY TORROMEO AND MDR CORPORATION

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121P

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37(b), Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioners Harry Torromeo and MDR Corporation.[1] Written consent for amicus participation in this case was granted by counsel of record for Petitioners. Consent was withheld by Respondent Town of Fremont.

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind in America. For 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by this Court in the last two decades, including the recent case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

PLF believes that its litigation experience will provide an additional, valuable viewpoint on the issues presented in this case. Specifically, PLF seeks to augment the arguments of the Petitioners by providing additional background on the jurisprudential framework in which this case arises. PLF's

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[1] In accordance with Rule 37.6, Amicus Curiae confirms that this brief was not written by counsel for any party in this matter and that no person or entity made a monetary contribution specifically for the preparation of this brief.

amicus brief directs this Court to lower court decisions, not cited by Petitioners, that are in conflict with each other and with the decision by the New Hampshire Supreme Court.

For these reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: May, 2003.

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QUESTION PRESENTED

Where Petitioner successfully argued that the application of a land use restriction to his property was "invalid ab initio," did the New Hampshire Supreme Court err in holding that Petitioner was not entitled to just compensation for the period during which the restriction barred otherwise permissible development?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 1

THE DECISION BELOW HIGHLIGHTS A TREND THAT DRASTICALLY LIMITS THE REACH OF THE JUST COMPENSATION REMEDY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF LOWER FEDERAL AND STATE COURTS 1

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 3

Chioffi v. City of Winooski, 676 A.2d 786 (Vt. 1996) 2

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 4

Landgate, Inc. v. California Coastal Commission, 953 P.2d 1188 (Cal. 1998) 1

Miller and Son Paving, Inc. v. Plumstead Township, 717 A.2d 483 (Pa. 1998) 2

Nemmers v. City of Dubuque, 716 F.2d 1194 (8th Cir. 1983) 3-4

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 3

Sea Cabins on Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach, 548 S.E.2d 595 (S.C. 2001) 2

Steinbergh v. City of Cambridge, 604 N.E.2d 1269 (Mass. 1992) 2

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 3

Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987) 3-4

Whitehead Oil Company v. City of Lincoln, 515 N.W.2d 401 (Neb. 1994) 4-5

INTRODUCTION

Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the petition for certiorari filed by Petitioner Henry Torromeo and MDR Corporation on April 14, 2003.

When a land use restriction is found to be invalid at inception, some lower courts have concluded that invalidation is the only relief available to the aggrieved property owner. These courts are split, however, on the rationale for denying compensation. Other courts have gone in the opposite direction, reasoning that compensation is required when a land use restriction is invalidated. Given the confusion below, this Court should grant the petition to clarify the circumstances under which an invalidated regulation will trigger the just compensation remedy of the Fifth Amendment.

ARGUMENT

THE DECISION BELOW HIGHLIGHTS A TREND THAT DRASTICALLY LIMITS THE REACH OF THE JUST COMPENSATION REMEDY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF LOWER FEDERAL AND STATE COURTS

State court decisions that refuse, like the decision below, to grant compensation for an illegal land use restriction have done so on two grounds. First, when faced with a claim that an invalid regulatory decision has caused a compensable taking by temporarily preventing all property use, a few decisions deny compensation on the ground that a statutorily-based "mistake" in application cannot give rise to a damages remedy. *See Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 1203 (Cal. 1998) (concluding that "a judicial determination of the validity of certain *preconditions to*

development is a normal part of the development process," and thus could not give rise to a right to a claim for compensation even when the "precondition" was invalid and denied all use during the judicial proceedings); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1275 (Mass. 1992) ("plaintiffs make no reasoned argument that, simply because a municipal regulation is not authorized by law, there is a compensable temporary taking . . . even though the regulation restricts the sale and reduces the market value of the property until the regulation is successfully challenged in court").

But when the claim rests purely on the allegation that application of the regulation was invalid and/or did not substantially advance a legitimate interest, other courts have held that compensation is available only where a regulation prevents all use of property. *Sea Cabins on Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595, 604 (S.C. 2001) (stating that while a landowner "who successfully challenges the applicability of a governmental regulation is likely to have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking"); *Miller and Son Paving, Inc. v. Plumstead Township*, 717 A.2d 483, 486 (Pa. 1998) (holding that an invalid regulation did not give rise to a temporary taking because it did not deny all use of property); *Chioffi v. City of Winooski*, 676 A.2d 786, 790 (Vt. 1996) (improper denial of variance did not cause a taking because compensation remedy reserved for denials of all use).

The decision of the New Hampshire Supreme Court adopts both of these rationales: it effectively holds that the compensation remedy *does not* apply if (1) any viable use of property remains; or (2) application of the restrictive regulation was an "erroneous" means to achieve a legitimate end. *See* Petitioner's Appendix (Pet. App.) at 1-3. Put in the affirmative, this means that compensation is due only when a regulation is valid *and* denies all use. *Id.*

Such a ruling puts a large class of regulatory land use restrictions beyond the reach of the Just Compensation Clause. In particular, it makes no room for compensation when a land use decision is such an unreasonable means of achieving a goal that it fails to substantially advance legitimate state interests. *Cf. Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2002) (noting that a landowner could argue for compensation on the ground that a temporary regulation was applied in bad faith or "did not substantially advance a legitimate state interest"). More generally, the decision below logically bars compensation whenever a land use restriction is illegally applied, regardless of its impact on the owner.

This ruling undermines the rule of law in the land use context because invalidation is simply not a strong enough consequence to deter excessive interference with private property. During the effective period of the regulation and litigation to have it reversed, the subject land will remain idle, as the government desires. If the government's actions are eventually struck down, it can simply start over, without any real liability. Given the highly discretionary nature of land use decision-making, it is inevitable that some regulators will take advantage of this situation. This is exactly the problem that this Court sought to rectify by mandating compensation as the constitutional remedy for all invalid land use restrictions that rise to a taking. *See, e.g., San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 655 n.21 (1981) (Brennan, J., dissenting).

In light of the practical problems associated with the invalidation remedy, it is not surprising that several important federal and state decisions stand in opposition to the decision below. Among these are *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 (11th Cir. 1987), *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1197-1200 (8th Cir. 1983), and

Whitehead Oil Company v. City of Lincoln, 515 N.W.2d 401, 407-08 (Neb. 1994).

In *Wheeler*, the city passed an ordinance that "outlawed construction of apartment complexes" throughout the city, including on plaintiff's land. *Wheeler*, 833 F.2d at 268. The district court found, and a panel of the Fifth Circuit subsequently agreed, that the city's actions "bore no substantial relationship to any legitimate police power interest." *Id.* The case was subsequently remanded to the district court for a determination of damages, but eventually returned to the newly-created Eleventh Circuit after the district court failed to properly calculate compensation for the period during which the invalidated ordinance was in effect. *Id.* at 269. At that point, the court of appeals reiterated that "the plaintiffs were entitled to compensation for the injury they sustained as a result of the temporary taking." *Id.* at 270. The court pointed to *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), as vindicating its earlier conclusion that compensation was required for the effective period of the irrational ordinance. *Id.*

In *Nemmers v. City of Dubuque*, the Eighth Circuit concluded that private property had been downzoned to agricultural use in violation of Iowa's vested rights law. 716 F.2d at 1197-1200. The court subsequently held that the aggrieved landowner was entitled to damages, under the United States Constitution, for the period during which the illegal zoning was in effect. 764 F.2d 502, 504-06 (8th Cir. 1985).

At the state level, the Nebraska Supreme Court made clear in *Whitehead Oil* that an arbitrary land use regulation will trigger compensation for its effective period. In *Whitehead Oil*, the landowner successfully challenged the validity of a zoning ordinance that limited its property to office uses. 515 N.W.2d at 400. The trial court then awarded damages for the five year period of litigation during which the ordinance remained in

effect. *Id.* at 400, 404-05. On appeal to the state supreme court, the city argued that there could be no compensable temporary taking under these circumstances and, thus, the damages were in error. *Id.* at 407. The Nebraska Supreme Court rejected this contention, concluding that the temporary takings doctrine established in *First English* was applicable to regulatory action that denied less than all use and, in particular, to cases where the regulation was invalid:

> Our determination . . . that in changing the applicable zoning designation the city acted not in furtherance of a legitimate state interest but arbitrarily and capriciously so as to deny Whitehead Oil a use permit, compels our agreement with the district court's ruling that Whitehead Oil's property has been subjected to a taking under the federal Constitution.

Id. at 408. It therefore upheld a damage award for the period during which the invalid zoning was in effect, calculated as the difference between the fair market value of the property as it existed under zoning allowing development of a convenience store and its value under the subsequent irrational zoning scheme. *Id.* at 411-12.

The decision of the New Hampshire Supreme Court is difficult to reconcile with the reasoning of the foregoing federal and state decisions. Unlike the decision below, these cases acknowledge the compensatory remedy is a general remedy not dependent on a denial of all use of property or the statutory "validity" of an ordinance at the time of enactment. *See, e.g.*, *Whitehead Oil*, 515 N.W.2d at 411. In contrast, the court below establishes compensation as the constitutional exception, one that is to be applied solely in the rare cases where government is foolish enough to impose the most draconian use restriction in an unreasonable manner. *See* (Pet. App.) at 1-3.

The manifest conflict between the decision below and the decisions of other state and federal courts warrants a grant of review under Rules 10(b) and 10(c).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: May, 2003.

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(5)

No. 02-1507

In The

Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,

Petitioners,

v.

TOWN OF FREMONT,

Respondent.

On Petition for Writ Of Certiorari To
The Supreme Court of New Hampshire

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Liability for a Fifth Amendment Taking:** When a state's highest court declares a growth control regulation "invalid *ab initio,*" but a town had enforced that illegal regulation in excess of its police powers against a specific piece of property, is the town liable to the affected property owner for a taking because it has failed to "substantially advance legitimate state interests"? (*Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)).

2. **Liability for a Fifth Amendment Taking:** Alternatively, when a state's highest court declares a growth control regulation "invalid *ab initio*" but a town had enforced that regulation against a specific piece of property, should that illegal municipal conduct be considered under the "character of government action" factor set forth in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978), as one element to determine whether the town is liable for a taking?

3. **Remedy for a Fifth Amendment Taking:** Does the "self-executing character" of the Takings Clause compel the payment of "just compensation" to an aggrieved property owner for the time period in which a growth control regulation, declared "invalid *ab initio*" by a state's highest court, was enforced against a specific piece of property? (*First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987)).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

1. **The Town's Argument, That The Invalid Growth Control Ordinance Was Never Challenged On A Constitutional Basis But Was Merely Procedurally Defective, Is Meritless** 1

2. **The Court Must Grant Certiorari To Clarify Whether Landowners Must Litigate The Validity Of A Land-Use Regulation First, Before Government Action Can Be Considered A Fifth Amendment Taking** 3

3. **Petitioners Did Not "Waive" The *Penn Central* Argument** 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES Page

Agins v. City of Tiburon, 447 U.S. 255 (1980) i

Ali v. City of Los Angeles, 77 Cal. App. 4th 246 (2000) 6

Armstrong v. United States, 364 U.S. 40 (1960) 3

Brown v. Legal Found. of Washington, 538 U.S. ---, 123 S.Ct. 1406 (2003) 1, 8

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) ..... i, 4

Healing v. California Coastal Comm'n, 22 Cal. App. 4th 1158 (1994) 6

Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188 (Cal. 1998), *cert. denied*, 525 U.S. 876 (1998) 4, 5

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 6-7

Manor v. Reisma, 2003 WL 1224248, No. C.A. PC 89-2447 (R.I. Super. Feb. 24, 2003) 7

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 3, 7

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 3

Penn Central Transp. Co. v. City of New York,
438 U.S. 104 (1978) i

Rock Island, A. & L.R. Co. v. United States,
254 U.S. 141 (1920) 2

San Diego Gas and Elec. Co. v.
City of San Diego, 450 U.S. 621 (1981) 6

Tahoe-Sierra Preservation Council v. Tahoe Regional
Planning Agency, 535 U.S. 302 (2002) 1-2

United States v. Riverside Bayview Homes,
474 U.S. 121 (1985) 1, 2

OTHER

Jon Lycett, *Landgate, Inc. v. California Coastal Commission—*
Why Temporary Takings Law is "Screwed Up,"
7 Hastings W–N.W. J. Envtl. L. & Pol'y 55 (2000) 6

Petitioners Henry Torromeo and MDR Corporation respectfully file this Reply to the Brief in Opposition ("Opp. Br.") of Respondent Town of Fremont (the "Town").

The Town argues that *certiorari* should not be granted for three reasons. Each lacks merit.

1. The Town's Argument, that the Invalid Growth Control Ordinance was Never Challenged on a Constitutional Basis but was Merely Procedurally Defective, is Meritless.

To dissuade this Court from granting *certiorari,* the Town argues that "this is not a case where the Growth Control Ordinance was challenged on constitutional grounds." Opp. Br. at 2. The Town is wrong. Petitioner argued in the New Hampshire courts that the illegal Ordinance was "unconstitutional per se" because it was "invalid, *ab initio.*" (App. 3)

In any event, when the New Hampshire Supreme Court ruled that liability to pay just compensation depends on a finding that "the ordinance is unconstitutional and constitutes a taking" (App. 6), it misconstrued the Fifth Amendment and this Court's cases for two reasons. First, even constitutional or otherwise valid laws can trigger takings liability when they are applied and "go too far." See *Brown v. Legal Found. of Washington,* 538 U.S. ---, 123 S.Ct. 1406, 1417 (2003) (one of the "conditions" imposed by the Fifth Amendment is that a taking must be for a valid "public use"). Second, this Court has never hinged takings liability on the constitutionality of an ordinance *itself,* but rather typically conducts a takings analysis on an as-applied, ad hoc basis. See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 535 U.S. 302, 320 (2002) (takings claimants face a steep "uphill battle"

in arguing that the "mere enactment" of a law is *per se* unconstitutional); *United States v. Riverside Bayview Homes,* 474 U.S. 121, 126 ((1985) ("the mere assertion of regulatory jurisdiction does not constitute a regulatory taking").

To further impede this Court's review, the Town insists that "[n]othing in the Court's taking jurisprudence suggests that a procedural defect in the adoption of a growth control ordinance...gives rise to takings liability." Opp. Br. at 4. We take strong issue with the Town's characterization that the illegal Ordinance suffered from an innocuous procedural defect,[1] and its reasoning provides no help. Nothing in this Court's jurisprudence even hints that enforcement of a law that fails to satisfy mandated legislative requirements *absolves* a municipality from takings liability.

A landowner would be audacious to suggest that his good faith but "merely procedural" non-compliance with land-use regulations must be ignored and forgiven. Yet here, where the Town conveniently acts as both player *and* referee, it seeks Fifth Amendment sanctuary for what it deems a procedural technicality in adopting and enforcing a law that derogates mandated legislative requirements. "Men must turn square corners when they deal with the Government." *Rock Island, A. & L.R. Co. v. United States,* 254 U.S. 141, 143 (1920) (Holmes, J.). That rule must be recipricol; government, too, must turn square corners when it regulates property, or else it runs the risk

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[1]In truth, the Town illegally adopted a growth control ordinance, deprived its citizens an opportunity to be heard on the important issue of growth management, and proceeded to enforce that invalid law against Petitioners. See Pet. 6-7. The illegality was so egregious that the New Hampshire courts found the Ordinance "invalid, *ab initio.*" See Pet. 7-8. These facts are uncontested, and we find it curious that Respondent ignored them entirely when it decided to restate the Questions Presented. See Opp. Br. at i.

of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). Just as there is no "merely procedural" exception to excuse a builder's non-compliance with land-use restrictions, there can be no "merely procedural" exception allowing government to execute an end-run around the Takings Clause.

In the end, it matters little to a property owner whether the government takes his land by applying a substantively unconstitutional law, or one that is "merely" defective procedurally. It is "*the effects produced* by a particular regulation [that] inform the takings analysis" (*Palazzolo v. Rhode Island,* 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (emphasis supplied)—not whether government committed a mistake. And this reasoning is correct, because "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a governmental benefit." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 (1987).

In short, the Town's failure to follow mandatory statutory procedures is no reason to allow it to escape the Takings Clause.

2. The Court Must Grant Certiorari to Clarify Whether Landowners Must Litigate the Validity of a Land-Use Regulation First, Before Government Action can be Considered a Fifth Amendment Taking.

To dissuade this Court from granting *certiorari,* the Town argues: "Thus, the issue of a taking could not arise until

the [New Hampshire courts] had ruled on that issue." Opp. Br. at 6. But this Court has ruled the exact opposite:

> It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320 (1987).

As if the Questions Presented in the Petition were not enough, the Town's Opposition Brief now throws in another issue that begs for this Court's resolution. For the first time, in its Opposition Brief the Town now contends that a taking only could have occurred *after* the New Hampshire Supreme Court summarily affirmed that the Ordinance was "invalid, *ab initio.*" Opp. Br. 6, Section II. From the Town's perspective, no takings claim could have accrued when it actually enforced and applied the illegal Ordinance to deny Petitioner's their permits. Thus, the Town argues that Petitioners' pursuit of litigation up to the New Hampshire Supreme Court over the validity of the illegal Ordinance was a "normal delay" in the permit approval process. *First English,* 482 U.S. at 321. However, the "normal delays" suggested by *First English* pertain to ordinary administrative remedies in the land-use arena, specifically, "obtaining building permits, changes in zoning ordinances, variances, *and the like which are not before us.*" *Id.* (emphasis supplied.)

Now that the Town "likens" state court litigation to "normal" administrative delay, the majority opinion of the California Supreme Court in *Landgate, Inc. v. California Coastal Comm'n,* 953 P.2d 1188, 1195 (Cal. 1998), *cert. denied,* 525 U.S. 876 (1998), has been exported eastward, creeping into New Hampshire. In *Landgate*, a divided 4-3

panel decided that a property owner's pursuit of litigation in the state court system, challenging the validity of regulatory action, was merely a "normal part" of the development process and therefore was not a temporary taking under the Fifth Amendment.[2] Three dissenting justices, in two separate dissenting opinions, voiced sharp criticism against that result. Two of the *Landgate* dissenters pointed out that Justice Stevens, in his own *First English* dissent, "articulated the precise argument...that litigation over the validity of a land-use restriction is simply a 'normal delay' in the permit approval process and, therefore, cannot give rise to a temporary taking"—and moreover, that the majority opinion in *First English* "considered Justice Stevens' argument *and rejected it.*" 953 P.2d at 1206 (emphasis in original) (Justices Chin and Baxter, dissenting). A third dissenting justice in *Landgate* also rejected the notion that litigation over the validity of land-use decisions is a "normal" part of the process. He declared the *Landgate* majority's opinion "tendentious," and thought "[t]he precise issue has thus been considered and rejected by the [United States Supreme Court]." *Id.* at 1209-10 (Justice Brown, joined by Justice Baxter, dissenting).

Does the "normal delay" exception to takings liability really encompass litigation over the validity of a land-use regulation up and through the state court system? Respondent thinks yes. But the *First English* majority thought no, while dissenting Justice Stevens thought yes. The *Landgate* majority thought yes. And three *Landgate* dissenters thought no. Justice Brennan, whose writings are so influential in this area, would

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[2]The *Landgate* majority ruled: "[A] judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a developer must resort to such a determination [in the courts] does not constitute a per se temporary taking." 953 P.2d at 1203 (emphasis in original).

have thought no.[3] Lower court judges, understandably, are utterly confused.[4] Whatever the law is, this Court must state it.

If litigation over the validity of a land-use law is a "normal" part of the approval process, the law is as the Town and *Landgate* would have it, then when would a taking *ever* arise? Under that Carrollesque scenario, compensation would only become due after (1) litigation in state court over the validity of an ordinance is consummated, (2) the court invalidates that particular ordinance, (3) government ignores that court order, running the risk of contempt, and (4) *government continues to apply that regulation after its judicial invalidation.* Application of the Takings Clause would thereby "amount[] to a test of whether the [regulatory agency] has a stupid staff," (*Lucas v. South Carolina Coastal Council,* 505

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[3]See *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) (liability to pay just compensation for the time during which an invalid regulation is in effect "encourage[s] municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts").

[4]See, e.g., Jon Lycett, *Landgate, Inc. v. California Coastal Commission--Why Temporary Takings Law is "Screwed Up," 7 Hastings* W–N.W. J. Envtl. L. & Pol'y 55 (2000). The California cases alone are incoherent. Other decisions there have not followed the approach taken by *Landgate.* See, e.g., *Ali v. City of Los Angeles,* 77 Cal. App. 4th 246, 254-55 (2000) (affirming finding of regulatory taking requiring payment of compensation; refusing to apply *Landgate,* because it is "not a 'normal' delay in the process [where agency action] is so unreasonable from a legal standpoint as to be arbitrary"); *Healing v. California Coastal Comm'n,* 22 Cal. App. 4th 1158, 1171 n.7 (1994) ("summarily" rejecting the Coastal Commission's contention that delay suffered by plaintiff is "normal" and holding that the Commission "may be liable for a regulatory taking even if it ultimately issues a permit").

U.S. 1003, 1025 n. 12 (1992)), because government could easily circumvent the compensation remedy through "an exercise in cleverness and imagination." *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 841 (1987).

"Framing the issue as the [Town] would have us do here would be tantamount to accepting a categorical rule that precludes agency mistakes from ever amounting to a taking."[5] Respectfully, certiorari must be granted to address whether litigation over the validity of a regulation falls within the *First English* "normal delay" exception to a taking.

3. Petitioners did not "Waive" the *Penn Central* Argument.

Finally, the Town argues that *certiorari* should be denied because "Petitioners fail to cite the Penn Central case or its holding [before the New Hampshire Supreme Court]; therefore, any argument based on that case has been waived and is not properly before this Court." Opp. Br. at 6. True, Petitioners did not cite *Penn Central* in the state court proceedings, but they did cite *First English,* which in turn cites *Penn Central* (as well as Justice Brennan's plurality dissent in *San Diego Gas,* which cites *Penn Central.*) Moreover, at oral argument before the New Hampshire Supreme Court, on July 11, 2002, New Hampshire Justice Dalainis directly asked counsel of record for both parties whether *Tahoe-Sierra* was "dispositive" in the case at bench.[6] And *Tahoe-Sierra,* in turn, relies so heavily on *Penn*

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[5] *Manor v. Reisma*, 2003 WL 1224248, No. C.A. PC 89-2447 (R.I. Super. Feb. 24, 2003) at *11 - *12 (expressly rejecting analysis of *Landgate* majority, and following analysis of *Landgate* dissenting Justice Brown).

[6] In response, counsel for both Petitioners and Respondent stated that *Tahoe-Sierra* was not dispositive in the case at bench. Counsel for

Central to the point of homage. Takings claims under the United States and New Hampshire Constitutions were pled and briefed. Just because the New Hampshire Supreme Court failed to cite *Penn Central* in its decision does not mean that Petitioners waived the argument.

The New Hampshire Supreme Court's failure to conduct the ad hoc balancing test first enunciated in *Penn Central,* and reconfirmed in *Tahoe-Sierra, Palazzolo,* and as recently as last March in *Brown v. Legal Found. of Washington,* 538 U.S. ---, 123 S.Ct. 1406, 1417-18 (2003), is fairly in play.

[CONCLUSION PAGE FOLLOWS]

Petitioners reasoned that *Tahoe-Sierra* did not apply because the moratoria halting development in the Lake Tahoe basin were valid, while the Ordinance at issue here was "invalid, *ab initio.*" Petitioners have requested a transcript of the oral argument before the New Hampshire Supreme Court, and will expeditiously file a supplemental appendix with this Court once it is received.

CONCLUSION

Tahoe-Sierra emphasizes that "[c]onsiderations of fairness and justice" underlie the takings analysis. 535 U.S. at 333. It is neither fair nor just for municipalities to immunize themselves from takings liability when they fail to follow thei own laws and enforce illegal ones.

For the foregoing reasons, and for those stated in the underlying Petition, the writ for *certiorari* should be granted.

DATED: May 15, 2003

Respectfully submitted,

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No. 02 - 1507

In The

Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,

Petitioners,

v.

TOWN OF FREMONT,

Respondent.

On Petition for Writ Of Certiorari To
The Supreme Court of New Hampshire

SUPPLEMENTAL APPENDIX TO PETITIONERS' REPLY

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18 pp

Henry Torromeo and MDR Corporation (Petitioners), respectfully file this Supplemental Appendix ("Supp. App.") to their Reply Brief.

Petitioners' Reply Brief at page 8, fn 6, explained that a transcript had been ordered for the oral argument before the New Hampshire Supreme Court held on July 11, 2002. This Supplemental Appendix provides the transcript from that hearing. An accompanying affidavit is filed attesting that the transcript is a true and accurate account of the statements made at the July 11, 2002 hearing. Petitioners' Counsel will maintain custody of the tape provided by the New Hampshire Supreme Court.

The transcript shows that the New Hampshire Supreme Court asked counsel for both sides whether *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002), should impact its decision. *See* Supp. App. 3, 14-15. Additionally, counsel for Petitioners here argued that this case concerns issues addressed in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987). *See* Supp. App. 8.

DATED: May 30, 2003

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SUPPLEMENTAL APPENDIX

TRANSCRIPT OF ORAL ARGUMENT
STATE OF NEW HAMPSHIRE SUPREME COURT
DOCKET NUMBER 2001-612
DATE: 7/11/02

Henry Torromeo v. Town of Fremont
MDR v. Town of Fremont

ATTORNEY FOR TOWN OF FREMONT:

May it please the Court, I am Attorney John Ryan. I represent the Town of Fremont. I have members of the Board of Selectmen here today sitting on that side of the courtroom. This is an appeal from the lower court's ruling that the Plaintiffs were entitled to proceed to prove and recover damages for the temporary loss of the economic use of the plaintiffs' property, by reason of the imposition of a procedurally defective growth control ordinance. The lower court was right, your Honors, when it denied the plaintiffs' motion for summary judgment on the issue of liability. That denial was based on the defendant, the town's argument that since the growth control ordinance in question had not been found unconstitutional, no taking had occurred and that the Town could not be liable for inverse condemnation damages. The lower court was wrong when it later reversed that decision and ruled that the plaintiffs' were entitled to proceed and recover damages, prove and recover damages, regardless, of whether the growth control ordinance was unconstitutional.

Under New Hampshire law, municipalities are liable for so-called, inverse condemnation takings, only, where the ordinance itself is found to be unconstitutional and a zoning ordinance or land use regulation is unconstitutional only if it is found to be substantively, arbitrary, unreasonable and bears no relationship to the health, safety and welfare of the community. In this case, none of those findings were made by the lower court. What was found, was that a 1987 town meeting vote

twelve years before this ordinance was put into effect which purported to prove, provide the statutory authorization for the development of a capital improvement program was procedurally defective. And what had happened was that the statute requires the adoption of a capital improvement program as a statutory prerequisite to a growth control ordinance. The lower court found that the 1999 growth control ordinance was invalid, despite the fact that the town had, in fact, promulgated capital improvement programs and adopted them since 1987. The lower court order giving rise to this appeal, acknowledged that this flaw was a procedural error in nature, and that's at page 161 of the appendix, to the Notice of Appeal.

This court has held that the procedural error, in the enactment of the zoning ordinance, is insufficient to support a takings finding and that's the Dugas v. Conway case, cited in our brief. Therefore in the absence of a finding that the ordinance is unconstitutional, the town cannot be liable for any damages claimed by the plaintiffs. And it should be noted, that this is not a case where once having been told by the court that its ordinance was invalid, that the town, nevertheless, went ahead and enforced it. What happened was, the town defended the original allegation, that its ordinance was procedurally defective, and at the conclusion of that contest, having been advised that the 1987 proceedings were defective, the building permits sought by the plaintiff were, in fact, issued. So, not only, has there been no finding that the growth control ordinance was substantively, arbitrary, unreasonable, there has also been no finding that the town has acted in bad faith and while it was contesting the first cases, which gave rise to this case. The question therefore becomes, your Honors, is this court going to change established law and allow recovery for the temporary loss of the economic of property where that loss, is the result of a procedurally defective ordinance?

COURT: Wasn't the town on notice though, from 1984 that it had to adopt a validly legally sufficient act before enacting and enforcing a growth control ordinance, didn't they know that then and haven't they still, as of this date, failed to do that?

A: No, the answer to that is clearly, no. In 1987, the town, at its annual town meeting, thought that it had properly authorized its agencies to develop a capital improvement program. Nobody told the town in 1987, 1988 all the way until the court order, in this case, in 2000 that that was a procedurally defective process. They were not told that until this court said that, until the lower court said that, as a result of the initial litigation in this case.

COURT: Even if you agreed with everything being put forward by your opponents, even if you did, wouldn't the, that recent United States Supreme Court case, relative to Lake Tahoe and temporary loss of use have some bearing on the outcome of this case?

A: No, because that case, your honor, did not deal with the question of whether or not an ordinance which is procedurally defective as opposed to substantively defective gives rise to the right to recover damages in an inverse condemnation case. That is the distinction.

COURT: I understand that and maybe I didn't ask my question correctly. Suppose we did change, what you say is settled law and said they are entitled here regardless of what it used to be to get this element of damage because it was a taking. Doesn't that case then come into play so even if he were so inclined he can't do it?

A: Yes, I think that's also it, that's also true. You have to find that the ordinance itself, in this case, the growth control ordinance, is so wrong in its substance that it doesn't

accomplish a reasonable and legitimate police power goal of the municipality.

COURT: Why is that the distinction if the effect on the planning is the same, that is, that he can't use his property during the period that the invalid unconstitutional ordinance is in effect? The economic impact on him is the same, regardless of the reasons for the invalidity of the ordinance.

A: That may be the case, your Honor

COURT: So why is there a distinction in terms of its ramifications?

A: Because in order to rise to the height of requiring towns to compensate land owners, monetarily, for the loss of economic use of property, the ordinance itself has to be found unconstitutional.

COURT: I understand that, why?

A: Because, that is the foundation of the Fifth Amendment of the United States Constitution and the Amendment to the New Hampshire Constitution, and that is, that unless the town has acted in a manner which strips that property owner of a constitutional right, as opposed to having a procedurally defective ordinance, that has to be the basis, otherwise, this is what will happen.

And I'll give you an example. Suppose a town passes a wetland setback ordinance that says you can't build within a hundred feet of wetland, and the ordinance is later found to be procedurally defective because it doesn't comply with the zoning enactment statute. Let's say that instead of having two public hearings, there was only one public hearing or that instead of having two places of notice posted, there was only one notice posted. The land owner comes forward and says, I

could have used my land that lies within this 100 feet for an economic use, the ordinance that they now imposed on me, which I have now proven was procedurally defective, entitles me to the temporary loss of the economic use of that 100 feet of my property. That is not the law and shouldn't be the law. The reason it shouldn't be the law is that the ordinance itself hasn't caused the landowner the damage, he's claiming the procedural defect is causing the damage and that is not, that does not give rise to compensable damages under inverse condemnation takings, as it exists and it should exist.

COURT: Did the plaintiff here ask the judge to hold or find as a preliminary matter that the ordinance was unconstitutional and that Judge McHugh kind of decides that, is that right?

A: Well he, no, what he asked was for a ruling that he did not have to prove that the ordinance was unconstitutional, substantively.

COURT: But that the town continued to enforce the ordinance that the trial court had found was invalid.

A: No, that's not true. After the court ruled, that in both of these cases, the Torromeo case and the MDR case, I want this clearly understood, after the court ruled and those orders became final the building permits sought by the plaintiffs were immediately issued. The time of the damages that were filed in the file trial on damages, related to that window, between the date of the enactment of the ordinance and the date that the court found that the ordinance was invalid, not afterwards, because the town in fact, issued the permits when it was told that its ordinance was invalid in the final orders.

COURT: So that plaintiff is incorrect here? And says that for a period of nine months they continued to enforce an invalid ....

A: No, he's not incorrect, the ordinance was enacted in March of 1999, ok? The ordinance was challenged, in terms of its validity, during the next nine-month period. Then the lower court said Judge Murphy's order came out, the ordinance is invalid. When this court did not accept the appeal that the town took, the town immediately issued the building permits, that order became final. So we both have a situation where the lower court has said its invalid and the town can, nevertheless continue to enforce it.

COURT: So you draw a distinction that if a town enforces an unconstitutional ordinance, even if it doesn't know it's unconstitutional it's subject to damages?
A: This is not an unconstitutional ordinance.

COURT: I know that, but what you're saying, even if they don't know it's unconstitutional they're subject to damages? But it can continue to enforce an ordinance which someone claims is invalid, there is no similarity there? There's no right to recover?
A: If the ordinance is invalid because of a procedural error, a town is not subject to liability for inverse condemnation damages. If the town enforces an ordinance as it did in Burrows v. Keene, that is clearly unconstitutional on its face, then the town takes the risk. The town does not take a risk of inverse condemnation damages where the ordinance is only procedurally defective. It only takes that risk if it is substantively unconstitutional.

COURT: If we agree with your position then, do we remand this case for a trial or hearing on the constitutionality of the ordinance?

A: The plaintiff has not raised that question, if the plaintiff wants to bring a separate action claiming the ordinance is unconstitutional, I suppose they could do so.

COURT: They already asked the court to clarify the Constitution with this request.

A: He hasn't, if, that I suppose, is one alternative, it could be remanded back for further trial on whether or not the ordinance is unconstitutional if the plaintiff wants to proceed that way.

COURT: The problem I have is that if Judge Murphy ruled that the ordinance was invalid on procedural grounds he didn't reach the constitutional issue. So that, essentially under your argument, judges would have to reach constitutional issues with respect to these ordinances and not just their rulings on procedural issues. Sort of runs contrary to the general rule of when you reach constitutional issues.

A: Well, but the plaintiff, in the first case, your Honor, did not request the court to award damages. He requested the court to find that the ordinance was invalid on procedural grounds. That's all I have your Honor. Thank you.

ATTORNEY FOR HENRY TORROMEO AND MDR CORPORATION:

May it please the court, my name is Sumner Kalman. I practice in Plaistow, New Hampshire. This is Thea Valvanis who is an attorney that works with me and has worked with me on this case. First, let me say that I think that if the court affirms the decision in this case, that a substantial volume of appeals taken from decisions that towns make in this state, would be reduced and appeals to this court would be reduced.

My clients are small business type people, they build homes. MDR builds homes for a living, MDR stands for Mark, Russell, and Daniel, they had a fourteen lot subdivision in Fremont. They were allowed to have five building permits and told that they could not apply or expect to receive the remaining nine building permits for at least a year because there were vested subdivisions in town that may be entitled to building permits ahead of them. There was no assurance when they would receive building permits even after a year. They're small business people. As I said, they don't have unlimited amounts of capital. They had to catch the economy when they could and build homes when they could. And needless to say this growth control ordinance put them out of business and meant that those nine lots were not at all useable, which I think, clearly triggers a temporary taking under Lutheran, which is cited in this court's case, Smith v. Town of Wolfeboro.

The word invalid that was used by Judge Murphy in the underlying decision, it was "invalid *ab initio*," which is language that Judge Murphy included in his decision, *ab initio*, from the beginning, I think is pointing toward the Lutheran decision and your use of it in the Smith v. Wolfeboro case where you say "a taking occurs when the application of a regulation to a particular parcel denies the owner of an economically viable use of his or her land." It says, although the board's decision did not permanently deprive the owners of a right to develop their land, it could nevertheless be compensable if it effected a temporary taking. And, what Lutheran, I think says, is that the taking occurs at the point when the town does not issue a building permit. So, the important point is, that is, if, at the point when the town refused to issue a building permit, that's when the potential taking occurred.

We alleged in our initial lawsuit that the regulation, the growth control ordinance itself, was not valid, not legal. Where

the court, I think, is being led astray somewhat is by this use of the word procedural and the concept here that somehow, that's okay. I think Justice Duggan pointing to well, what is unconstitutional, what is the effect on the owner of the land? He can't use his property. Why? Because of a growth control regulation. Well, what is the validity of a growth control regulation? It's invalid and it's invalid, *ab initio*. That's what triggers the taking. Talking about the substantive omission that caused this ordinance to be invalid, our growth control statute specifically requires that a town adopt a master plan and a capital improvement program. The idea of the master plan and the capital improvement program, I believe, is to encourage towns to accept the growth that they are legally required to accept. And as Justice Nadeau pointed out in 1984 in Stoney Brook Development Corp. v. Town of Fremont, this court told the Town of Fremont that growth control ordinances are intended to regulate and not control the timing of development, not the prevention of development. So, a master plan and the capital improvement program are designed to require the town to plan for growth and to develop a capital improvement program so that both can be accommodated in an orderly fashion.

COURT: Doesn't public policy and good government require really legislative bodies be able to act in good faith and not be subject to damages for some defect, the kind of defect that existed here? And shouldn't the plaintiff have to show some kind of malice or some kind of conduct on the part of a town before becoming entitled to damages? Otherwise anytime a body acts by mistake or otherwise it's subject to damages?

A: Well, that's not in our New Hampshire Constitution and certainly it's not in the Fifth Amendment of the United States Constitution, in other words, the Amendment to the Constitution,

the Fifth Amendment says that if there is a taking by the government, then the government should compensate the property owner for the taking. There is certainly nothing in the Fifth Amendment that says that only a taking with malice would generate compensation. This is a situation, inverse condemnation, there are two kinds of taking here, where compensation would be required. That is, one where the state literally takes a piece of land, let's say to build a highway or a regulation. And our position is, which is invalid, which is when the state says we're going to take your property temporarily and it turns out the regulation they're relying on is invalid *ab initio*, then that triggers the constitutional compensation requirement.

COURT: So while the economic impact is the same, the problem is that you want to say that the most severe remedy to deter towns from acting in a way that violates the Constitution, I think there's a question of proportionality as a remedy to the wrong here and, and that's the reason for the rule that town argues. Do you agree that there's a proportionality issue here?

A: No, I don't. I think either the ordinance is invalid or its not and what I was getting to with the capital improvement program was that I don't think the court should be led astray by the concept of procedural error.

COURT: It can be invalid without being unconstitutional.

A: I think the effect of enforcing an invalid regulation can be unconstitutional whether or not, if the balance of the ordinance were sustainable and constitutional that would have supported it.

COURT: That wasn't the question I asked, an ordinance can be invalid without being unconstitutional. Do you agree?

A: Well, no. Because I think it's kind of a trick question, in that …

COURT: It wasn't meant to be.

A: I understand, but conceptually I guess what I'm saying is, what's unconstitutional? What's unconstitutional is that a property owner can't use his property and is being deprived of use of his property as a result of the enforcement of an ordinance that's invalid. Let's say the ordinance itself, I don't think you could have growth control ordinance that isn't supported by a validly adopted capital improvement program, and consider it constitutional. That's the guideline, that's the standard the legislature and this court gave us when it said you had to have a master plan and a capital improvement program in place before you could adopt a growth control ordinance.

COURT: You're saying the constitutionality is two-fold, one is the constitutionality of the ordinance the other is the constitutionality of the taking?

A: Yes, I'll agree with that and the example I'm going to give you is that Attorney Ryan says, and this is the example in my head, I mean I have a little difficulty with this procedural concept because I don't see this as innocuous. The language that was used, for instance, in the Dugas case, I believe, talks about some arcane procedural error, that's Dugas v. Town of Conway, this is not some arcane procedural error. This is an omission of a substantive requirement of a growth control ordinance in this state. That is, a capital improvement program which has to be at least six years in duration and requires the Town to commit to accepting its fair share of growth through the formation of this capital improvement program.

COURT: But, I thought they had one on the books? Didn't they?

A: It was not, well, then I guess also, let's take a look at the underlying statute that would cause a capital improvement program to be valid and that's 674:5 that is significantly captioned "Authorization," and it goes on to say that the legislative, local legislative body may authorize the planning board to prepare and amend a recommended program of municipal capital improvement projects, projected over a period of at least six years, and then it goes on to talk about the details. This is a commitment on the part of a town to accept its fair share of growth by combining a master plan and a capital improvement program so that the mandate that was set out in Stoney Brook v. Fremont is met. That is that they are planning growth, they can't stop it but they've got to plan for it so they can accept their fair share of growth.

So, I'm saying that being led astray by this procedural concept, there's nothing procedurally, you know. I understand, I can understand if it was one of these arcane procedural errors, as referred to in Dugas, this is not one of those. This is an ordinance that I believe is unconstitutional because it doesn't meet the very obvious test of the growth control statute that requires a master plan and capital improvement program as a prerequisite to a growth control ordinance. So, it's so obviously unconstitutional, that to say that if it's invalid, *ab initio* because it fails to meet the threshold requirement of a capital improvement program. I now have the additional burden of going forward and saying, well even if it were valid on that basis, then I have the additional burden of showing, well it would have been unconstitutional for other reasons.

COURT: So are you drawing a distinction between what you call, obviously invalidly adopted and just plain ordinarily invalidly adopted? And, if so, does it mean that anytime a town adopts an ordinance and then follows that ordinance and denies people, any applicant, the right to use their property in accordance with that ordinance that

everybody who's denied that permit, during that period, until the statute of limitations or once somebody determines invalid is entitled to recover damages against the town?
A: I could possibly answer that question, yes. It's a little broad for me to say yes to that. I guess what I would say that if an ordinance were not found to be enforceable because of what you call, some arcane procedural error which is the language.

COURT: How about just procedural error? Never mind arcane.
A: I guess you would have to give me an example, your Honor, of what you meant by procedural.

COURT: Let's go back to Justice Nadeau's question. Let's assume that an ordinance has been in effect for ten or six years and at some point it's determined to have been improperly adopted, procedurally. Is everybody who's suffered damages during that period entitled to recover damages against the town?
A: No. I think

COURT: Where would you draw the line?
A: I think I'd draw the line at arcane, that seems to be the word the court likes. If it's an arcane procedural error, I mean I think you fall into the area of harmless error. I mean there is a whole concept that appellant courts can deal with these kinds of, oh gee, that really is, that is really arcane procedural error and we're not going to let that interfere with good faith enforcement of the ordinance.

That's not what we have in this case, what we have in this case, is that there is an omission of a statutory requirement that the legislative body authorized the capital improvement program and that never happened. There is a statement in the brief that was filed by the town that refers to a warrant article in

the 1987 warrant. Well, the underlying case isn't on appeal here and I don't know, I think we have provided you with enough information so you understand how Judge Murphy came to the conclusion he did, that it was invalid, *ab initio*. But there was never a warrant article on the 1987 warrant that authorized, or purported to authorize, the planning board under 674:5 to generate a capital improvement program. At the conclusion of the meeting, I'm presuming the question was asked, "Is there any other business to come to the meeting?" An ad hoc motion was made discussing a committee being formed to perhaps make recommendations to the planning board involving the police chief and the fire chief and other people in town. It was never warned, there was never a warrant article concerning it, and as Judge Murphy concluded, the motion, the ad hoc motion, made at the end of the meeting didn't authorize the planning board under 674:5 to prepare a capital improvement program either. So this whole procedural path that we're being led down, I don't think is appropriate here.

COURT: Well let's say we're on the substantive path. Suppose we were to agree with you that this was a substantively unconstitutional ordinance, why then, doesn't the Lake Tahoe case eliminate your damages anyway?
A: The Lake Tahoe case, your Honor, I believe deals with...

COURT: Temporary takings.
A: I understand. But, what wasn't there is the invalid regulation. There was no challenge in Tahoe. This is an interesting question. Let's say we have a valid growth control ordinance that was approved, master plan in place, valid capital improvement program in place. A perfectly valid growth control ordinance, which requires that land owners wait nine and one half (9 ½) months to get their building permit. Well, those land owners in Tahoe said, why should I have to wait 9 ½

months to get my building permit? If you think that the public would benefit from a 9 ½ month delay by my getting a building permit, that's fine. But, you should pay me for that 9 ½ months that I'm not having the use of the building permit.

The difference between Tahoe and this case is Tahoe did not challenge the validity of the ordinance and in this case, we did challenge it and we challenged it successfully. I point out that Smith v. Town of Wolfeboro language of this case, which might help explain why Judge Murphy used the word invalid. He could have used several other words to determine that that ordinance was not effective. He chose the word invalid and in Smith v. Town of Wolfeboro, and I'm quoting, "an erroneous planning board decision based on sound authority, must be distinguished from the application of an invalid regulation" and Judge Murphy chose the word "invalid *ab initio*" in describing the Fremont growth control ordinance. And I also point out that four Superior Court Judges have been involved in various phases of these cases and each of them came to the conclusion that plaintiffs had not done nothing wrong and were entitled to compensation and relief and the Town of Fremont has been unsuccessful in each of them. My red light is on so I would suggest that I'm concluded if there are no further questions.

COURT: **Thank you**

A: Thank you

COURT: **Case...**

ATTORNEY FOR TOWN OF FREMONT:

A: May I have a brief moment?

COURT: **How about 30 seconds?**

A: 30 seconds or less. First of all, factually speaking, the lower court didn't find there was no capital improvement program, the town in fact, and these are part of the

exhibits, enacted, adopted and promulgated and put into effect capital improvement programs from 1987 through 1999. Secondly, there is a difference between statutory invalidity and unconstitutionality. They are not to be equated, otherwise we'll run into this procedural problem giving rise to inverse condemnation takings and the scenario that I had set forth before in my example. Thank you.

COURT: Mr. Kalman

ATTORNEY FOR HENRY TORROMEO AND MDR CORPORATION:

A: Can't say no, I'm not going to take the full 30 seconds, but I would point out my first comment that the amount of the litigation that's filed involving planning board appeals and town related appeals, appeals to this court, I believe, firmly would be reduced dramatically, if there was some down side and there were some monetary relief available to people harmed by the enforcement of invalid regulations. Thank you.

COURT: Thank you, case submitted.